Supreme Court, U.S.
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No. 92-570

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ALFRED C. SHARPTON,

Petitioner,

vs.

HON. JOHN G. TURNER JR., Albany County Judge; ROBERT ABRAMS, Attorney General of the State of New York,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Would the pending State prosecution of petitioner violate the double jeopardy clause of the Fifth Amendment of the United States Constitution when essential elements of the pending prosecution, intent to evade taxes, and defrauding New York State and City of taxes, was conduct for which he was already prosecuted and acquitted for under an indictment charging 67 counts of scheme to defraud, falsifying business records and grand larceny?

Did the Court below err in applying this Court's holding in United States v. Felix 112 S.Ct.1377 (1992) to the case at bar, when the facts are clearly distinguishable, and when so doing significantly undermines the protection against double jeopardy accorded by this Court in Grady v. Corbin, 495 U.S. 508 (1990)?

PARTIES TO THE PROCEEDING

The petitioner, who is petitioner and appellant below, is ALFRED C. SHARPTON.[1]

Respondent HON. JOHN G. TURNER, Albany County Judge, is respondent below. Respondent ROBERT ABRAMS, Attorney General of the State of New York, is respondent and appellee below.

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[1] Rule 29.1 Statement Regarding Petitioners: The petitioner is not a corporation.

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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1992

No.

ALFRED C. SHARPTON,

Petitioner,

vs.

HON. JOHN G. TURNER JR.,
Albany County Judge;

ROBERT ABRAMS,
Attorney General
of the State of New York,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

Alfred C. Sharpton ("Rev. Sharpton") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the Court Of Appeals (5a) is reported at 964 F.2d 1284 (1992). The opinion of the District

Court (45a) is not reported. The opinion of the Appellate Division for the Third Department of the Supreme Court of the State of New York (75a) is reported at 170 A.D.2d 43; 573 N.Y.S.2d 328 (3d Dep't. 1991). The opinion of the County Court of Albany County, New York (92a) is not reported.

JURISDICTION

The judgment of the Court Of Appeals affirming the district court's dismissal of petitioner's writ of habeas corpus was entered on May 19, 1992. By order entered July 13, 1992 petitioner's petition for rehearing was denied. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides in pertinent part:

> ...nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb;...

§ 190.65 of the Penal Law of the State of New York provides in pertinent part:

> 1. A person is guilty of a scheme to defraud in the first degree when he: (a) engages in a scheme constituting a systematic ongoing course of conduct with intent to defraud ten or more persons or to obtain property from ten or more persons by false or fraudulent pretenses, representations or promises, and so obtains property from one or more of such persons; or (b) engages in scheme constituting a systematic ongoing course of conduct with intent to defraud more than one person or to obtain property from more than one person by false or fraudulent pretenses, representations or promises, and so obtains property with a value in excess of one thousand dollars from one or more such persons.
>
> 2. In any prosecution under this section, it shall be necessary to prove the identity of at least one person from whom the defendant so obtained property, but it shall not be necessary to prove the identity of any other intended victim.

§ 175.05 of the Penal Law of the State of New York provides in pertinent part:

> A person is guilty of falsifying business records in the second degree when, with intent to defraud he:
>
> 1. Makes or causes a false entry in the business records of an enterprise; or
>
> 2. Alters, erases, obliterates, deletes, removes or destroys a true entry in the business records of an enterprise; or
>
> 3. Omits to make a true entry in the business records of an enterprise in violation of a duty to do so which he knows to be imposed upon him by law or by the nature of his position; or
>
> 4. Prevents the making of a true entry or causes the omission thereof in the business records of an enterprise.

§ 175.10 of the Penal Law of the State of New York provides in pertinent part:

> A person is guilty of falsifying business records in the first degree when he commits the

> crime of falsifying business records in the second degree, and when his intent to defraud includes an intent to commit another crime or to aid or conceal the commission thereof.

§ 155.30 of the Penal Law of the State of New York provides in pertinent part:

> A person is guilty of grand larceny in the fourth degree when he steals property and when:
>
> 1. The value of the property exceeds one thousand dollars;

§ 155.35 of the Penal Law of the State of New York provides in pertinent part:

> A person is guilty of grand larceny in the third degree when he steals property and when the value of the property exceeds three thousand dollars.

§ 175.35 of the Penal Law of the State of New York provides in pertinent part:

> A person is guilty of offering a false instrument for filing in the first degree when, knowing that a written instrument contains a false statement or false information, and with intent to defraud the state or any political subdivision thereof, he offers or presents it to a public office or public servant with the knowledge or belief that it will be filed with, registered or recorded in or otherwise become a part of the records of such public office or public servant.

§ 1804 (b) of the Tax Law of the State of New York provides in pertinent part:

> (b) Any person who, with intent to evade any tax imposed by article twenty-two or any related income or earnings tax statute files a false or fraudulent return and, with such intent, substantially understates on such return his tax liability under such article or such statute, shall be guilty of a class E felony.

§1801 (a) of the Tax Law of the State of New York provides in pertinent part:

> (a) Any person who, with intent to evade any tax imposed under article twenty-two of this chapter or any related income or earnings tax statute, or any requirement thereof or any lawful requirement of the tax commission thereunder, shall fail to make, render, sign, certify or file any return, or to supply any information within the time required by or under the provisions of such article or any such statute, or who, with like intent, shall supply any false or fraudulent information, shall be guilty of a misdemeanor.

STATEMENT OF THE CASE

This case arises from the prosecution in Albany County, New York of Rev. SHARPTON on 3 counts of tax evasion for the years 1986 and 1987 after his acquittal in New York County on 67 counts of scheme to defraud, falsifying business records and grand larceny during the same period. Rev. SHARPTON claimed in the Court below that the Albany County prosecution is barred under the double jeopardy clause of the

Fifth Amendment of the United States Constitution as construed in Grady v. Corbin, 495 U.S. 508 (1990); Ashe v. Swenson, 397 U.S. 439 (1970); and U.S. v. Calderone, 917 F.2d 717 (2d Cir. 1990); cert. granted and judgment vacated, 112 S. Ct. 1657 (1992).[2]

The basis for Rev. SHARPTON's contention was that the conduct for which he was prosecuted in New York County was the misuse of the National Youth Movement (hereinafter "NYM") (an organization he led on behalf of young Black people in poor communities throughout New York) and its profit making arm Hitbound, Inc. (set up to enable record and music promotion

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[2] Rev. SHARPTON does not concede his claim fails to meet the test of Blockburger v. United States, 284 U.S. 299 (1932). However, it is not necessary to address this issue for the purposes of this petition.

companies to aid the work of the NYM) to appropriate money for personal gain without paying taxes on that money.

In his effort to prove the 67 count New York County indictment (charging, inter alia, a scheme to defraud New York State of taxes, falsifying business records with intent to evade taxes, and various larcenies in furtherance of the scheme to defraud) respondent Attorney General placed before the New York County jury all of the money received by the NYM and Hitbound, Inc. during the years 1985 through 1988 and argued that Rev. SHARPTON fraudulently diverted it to personal use with intent to evade New York State income taxes. Rev. SHARPTON contends that in acquitting him of all charges in New York County the jury found that he did not engage in the conduct of intentionally evading state

income taxes for the years 1986 and 1987 and, therefore, cannot be prosecuted for those crimes in Albany County.

After exhausting his State remedies, Rev. SHARPTON sought a writ of habeas corpus in the United States District Court for the Northern District of New York to bar the Albany County prosecution. When his petition was dismissed, Rev. SHARPTON appealed to the Court of Appeals for the Second Circuit and obtained a stay of the criminal trial pending appeal. It is the judgment of the Second Circuit affirming this dismissal that Rev. SHARPTON seeks to have reviewed by this Court.

Both the New York County and Albany County indictment were handed down on June 29, 1989. The former charged five counts of scheme to defraud (New York Penal Law, § 190.65); two counts of

falsifying business records (New York Penal Law §§ 175.10 and 175.05); and sixty counts of grand larceny (New York Penal Law §§ 155.30 and 155.35). The latter charged filing a New York State tax return with false information for the year 1987 (New York Penal Law § 175.35); understating his tax liability on the same return (New York Tax Law § 1804(b)); and failing to file a return for 1986 (New York Tax Law § 1801(a)). (6a-7a) On July 2, 1990 Rev. SHARPTON was acquitted of 67 counts of the New York County indictment. The Albany County charges are still pending.

In considering the double jeopardy claim, it is helpful to consider the structure of the New York County prosecution, the first prosecution of Rev. SHARPTON. Count 1 of the 67 count New York County indictment charged that

between 1985 and 1988 Rev. SHARPTON, "engaged in a scheme constituting a systematic ongoing course of conduct with intent to defraud ten or more persons...." This charge was amplified in a Bill of Particulars dated October 30, 1989. Specifically, on page 8 thereof, the Attorney General listed New York City and New York State as among the entities sought to be defrauded. (110a)

As for the specific acts covered by count 1, the Bill of Particulars states, "the FIRST count, however, embraces the time period and acts of the SECOND through FIFTH counts...." (100a) The SECOND through FIFTH counts, according to the Bill of Particulars, include the acts charged in counts 8 through 67 of the indictment. (See listing of sums and entities at 111a-122a)) On page 18

of the Bill of Particulars, it is stated, with regard to counts 8 through 67, "All of these counts charge larcenies from contributors to NYM (National Youth Movement, Reverend SHARPTON's Youth Action Group) by means of the schemes to defraud charged in the first through fifth counts." (125a) Moreover, the Bill of Particulars for counts 6 and 7 indicates that the acts specified therein were, likewise, undertaken in conjunction with the "scheme to defraud charged in the 1st count." (122a-124a) It is for this reason, that Justice Carey, presiding over the New York County trial stated in her charge to the jury, for Count 1,:

> In addition, the People contend that this count refers to all alleged solicitations by which the defendant allegedly received money for the National Youth Movement in the periods in the indictment. (163a-164a)

Counts 6 and 7 of the New York County indictment charged falsifying business records in the first degree on, respectively, June 8, 1986 and July 19, 1986. The Bill of Particulars states, for each count, "by this conduct, defendant sought to commit or conceal the crime of scheme to defraud charged in the first count, as well as violation of Tax Law § 1801(a)...." (123a, 124a) Thus, tax crimes, that is, depriving the State of New York of tax revenues were an explicit part of counts 1, 6 and 7 of the New York County Indictment for the years 1986 and 1987.[3]

This, of course, is precisely what Rev. SHARPTON is charged with in the Albany County indictment which is the

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[3] Moreover, as shown above, these counts included by explicit incorporation all of the acts charged in the New York County indictment.

immediate subject of this proceeding, namely false filing with intent to defraud or failing to file with intent to evade taxes for 1986 and 1987, the very years covered by the New York County indictment. The Attorney General's opening statement emphasized:

> All of this money was money he obtained from business dealings but he took it in the name of National Youth Movement in order to evade paying taxes.
>
> So we are going to prove to you that Al Sharpton's National Youth Movement had three real purposes: One, to get money from charitable donors by means of lies and misrepresentations. Two, to promote and enhance Al Sharpton's position and earnings from the popular music field. And, three, to enable Al Sharpton to hide earnings from the tax authorities. In short, ladies and gentlemen, a scheme to defraud.
>
> That is our case in a nutshell. (131a-132a)

To establish this scheme to defraud the Attorney General presented to the jury evidence of conduct he claimed showed that the monies received by NYM and Hitbound, Inc. were really tax free income to Rev. SHARPTON. Counts 6 through 67 of the indictment charge specific instances of alleged larceny. However, they are larceny only if the money was used not as Rev. SHARPTON said it would be, to further the purposes of the NYM, but for personal gain. As was demonstrated above, all of the money placed before the jury was pegged to either count 1 of the indictment, charging scheme to defraud the State of taxes, or counts 6 and 7 charging falsifying business records with intent to evade taxes.

Throughout the double jeopardy litigation in both state and federal

forums the Attorney General has maintained that the subject of the Albany County prosecution will be monies received from concert and record promotion activities and that while this money was before the Court in New York County, it was not presented there as illegal. Close analysis of this money shows this not to be the case.[4]

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[4] In this regard it is important to note that throughout the Attorney General has never pointed to any money other than that placed before the New York County jury which will be the subject of the Albany County prosecution. The issue has always turned on the characterization of the portion of the money attributed by the Attorney General to "business activities." Thus, the Appellate Division for the Third Department found, in considering Rev. SHARPTON's double jeopardy claim:

> In the bill of particulars furnished to petitioner in the New York County prosecution, the People asserted that petitioner used the bank accounts of the National Youth Movement, Inc. to conceal from the state tax authorities

(continued...)

The record before the Court below includes testimony of witnesses called by the Attorney General to show how Rev. SHARPTON allegedly diverted money from

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[4](...continued)
personal income that he earned from his business activities in the field of entertainment and music promotion.

Thus, it is clear that the theory of the People's case in New York County and the proof adduced in support thereof was that petitioner was engaged in a criminal transaction encompassing the years 1986 and 1987 to defraud the State by evading income taxes. Petitioner's alleged filing of a false 1987 tax return and his failure to file a 1986 return are acts which are clearly and unmistakably related to his objective of evading income taxes. Accordingly, the offenses for which petitioner is now sought to be prosecuted are based upon the same criminal transaction for which he was previously prosecuted and come within the provisions of CPL 40.20(2). (Sharpton v. Turner, 573 N.Y.S.2nd 328, 330 (3rd Dep't. 1991)

business ventures with them for personal use. This was an integral part of the schemes to defraud, the falsification of business records and the larcenies with which he was charged. It was the very conduct for which he was prosecuted.

For example at one point Rev. SHARPTON's attorney at the New York County trial objected to the introduction of evidence of a $10,000 transfer to Rev. SHARPTON for concert production expenses on grounds of relevance. In response to that objection, the following colloquy occurred between the Court and one of the prosecutors:

MR. GENECIN: And to the extent that it's your Honor's position that a further connection need to be made, I will say that we expect to have testimony with respect to just about every single one of these documents concerning the money that

was transferred to Reverend Sharpton and just exactly what the origin of that money was, and who that money was supposed to be for and what that was about.

THE COURT: And it relates to the charges in the indictment?

MR. GENECIN: Oh, yes, clearly. (133a-134a)

. The Attorney General even called to the stand in New York County Ludwig Shepherd, the accountant who prepared Rev. SHARPTON's 1987 New York State tax return.[5] Shepherd was examined with regard to his discussions with Rev. SHARPTON concerning his income in 1987.

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[5] The full trial transcript also contains the testimony of Herman Johnson, an accountant consulted by Rev. SHARPTON in 1986. Johnson testified that he received material from Rev. SHARPTON for the 1986 tax filing, but before he could begin work on Rev. SHARPTON's 1986 personal tax returns, he was served with a subpoena for all of Rev. SHARPTON's records by respondent Attorney General.

Rev. SHARPTON identified $14,000 as gross income from Don King, $20,500 from his work with Hitbound, $1,000 for consulting work and $1,500 for speaking engagements. (139a-140a) Shepherd explained how Schedule C of the return included the gross receipts of $20,500 from concert promotions. Shepherd was closely questioned by the prosecution as to the tax consequences of whether Hitbound was a corporation or a partnership and the tax consequence of whether sums received for concert promotion were held in escrow. (148a-149a) Shepherd also testified that he filed for an extension for the year 1986.

Perhaps most significant, again, is that Rev. SHARPTON's trial counsel objected to the introduction of the 1987 New York State tax return in the course

of Shepherd's testimony. The objection was overruled and the return admitted on the basis of the following representations by one of the prosecutors:

MR. SASLAW: First of all specifically both in Mr. Genecin's opening statement and certainly in the bill of particulars was mentioned one of the objectives of the scheme to defraud charge count one of the indictment was to conceal income from taxiing (sic) authorities and it has been clear from the outset that has been part of the People's proof on this case and specifically mentioned in the opening. We intend to mention it in summation.

One of the three areas we focused on and here you have a witness who was retained to assist Rev. Sharpton to file his returns, asked specific questions as to Reverend Sharpton's income and was given incomplete information based on the evidence that has been received so far which I

> submit illustrates the point that we are trying to make. (136a-137a)

The Attorney General also called a Mr. Reed Douglas from Freedom National Bank to testify regarding records subpoenaed from the bank accounts of Hitbound, the NYM and the Sharp reports. (150a-154a) Again, a discussion occurred as to relevancy. In allowing them into evidence, the New York County Court stated:

> I take the position Hitbound account and the Sharp account are relevant to this proceeding because of all of the connections that were made with respect to the National Youth Movement...It is obvious that all of these accounts are used to a certain extent in a sense that the National Youth Movement surfaces in each of the accounts. (155a)

Thus, we have a situation in which the very money that was before the New York County jury in an effort, by the Attorney General, to prove a scheme to defraud New York State of taxes or

falsifying business records with intent to evade taxes is now sought to be placed before an Albany County jury to consider charges of filing a tax return with false information for the year 1987, understating his tax liability on the same return and failing to file a return for 1986.[6] The only difference is how the particular charges are described under the Tax and Penal Law of

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[6] The Attorney General's efforts to avoid the obvious consequences of this is revealing in what it concedes. Thus in opposing Rev. SHARPTON's motion for permission to appeal to the New York Court of Appeals, Assistant Attorney General Christine Duisin stated in her affirmation of November 30, 1991:

> ...If, for instance, the sole income of defendant that the People could prove to establish his obligation to file a return was that which he was alleged to have obtained by means of the scheme to defraud and larcenies charged in New York County or that which he was alleged to have concealed by the falsification of business records charged there further prosection might be barred...

the State of New York. The conduct is the same. The New York County trial was itself a tax fraud prosecution. This is why the Albany County trial would "twice put (Rev. SHARPTON) in jeopardy of life or limb." U.S Const., V Amend. This is why the Court below referred to the issue herein "as a close and troubling question complicated by the uncertain state of the Supreme Court's double jeopardy jurisprudence. "(15a) Review by this Court is necessary for the reasons set forth in the rest of this petition.

REASONS FOR GRANTING THE WRIT

A. THE SECOND CIRCUIT HAS DECIDED THE IMPORTANT QUESTION OF THE CONSTRUCTION AND APPLICATION OF THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION IN A MANNER WHICH CONFLICTS WITH THIS COURT'S DECISION IN GRADY V. CORBIN

Rev. SHARPTON respectfully contends that the conduct for which he is being prosecuted in Albany is a subset of the conduct for which he was already prosecuted (and acquitted) in New York. Under the holding of Grady the second prosecution would be barred as it is for the same conduct. To avoid this conclusion, the Second Circuit resorted to the standard used in United States v Felix, that a prosecution for conspiracy is not barred because the defendant has already been prosecuted for conduct which constitutes some of the overt act constituting the conspiracy. Rev.

SHARPTON, however, is not being prosecuted for conspiracy in Albany County, nor, for that matter was he in New York. Therefore, the use of the Felix test was improper.

1. The Second Circuit has failed to follow the holding of Grady.

In Grady v. Corbin, 495 U.S. 508, (1990), this Court held that:

> [T]he Double Jeopardy Clause bars a subsequent prosecution if, to establish an essential element of an offense charged in that prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted.

Grady, 495 U.S. at 521. In so holding, this Court recognized that its double jeopardy jurisprudence was limited by its prior holding in Blockburger v. United States, 284 U.S. 299 (1932) and that Blockburger did not adequately protect defendants from the burden of multiple prosecutions.

While this Court in Grady sought to escape the strictures of the Blockburger analysis and broaden the scope of protection from repeated prosecutions, numerous circuit courts have expressed difficulty in applying the Grady analysis. See e.g. United States v. Calderone, 917 F.2d 717 (1990) cert granted, judgment vacted, 112 S.Ct. 1657, 118 L.Ed. 2d 381 (1992); United States v. Esposito, 912 F.2d 60 (3d Cir. 1990); United States v. Gonzalez, 921 F.2d 1530 (11th Cir. 1991); Ladner v. Smith, 941 F.2d 356, (1991)(rehearing and rehearing en banc denied).[7]

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[7] Even this Court noted that there would be difficulty in applying the majority's test in Grady. See Grady v. Corbin, 495 U.S. 508 (1990)(Dissent of J. Scalia)("I am greatly perplexed -- as will be the unfortunate trial court judges who must apply today's rootless decision -- as to what precisely it means. It is not at all apparent how a court is to go about deciding whether

(continued...)

The case at bar presents the ideal fact pattern for a straight forward application of Grady. However, the Second Circuit, confused this Court's analysis in Grady, with this Court's analysis in United States v. Felix, 112 S.Ct. 1377 (1992), thereby reaching a result which is at odds with this Court's holding in Grady. Pursuant to Grady, Rev. SHARPTON has already been prosecuted -- in New York County, New York -- for conduct that constitutes essential elements of offenses for which the respondents seek to prosecute him for in Albany County, New York.

To state it more directly, the record of the New York County case

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[7](...continued)
the evidence that has been introduced -- or that will be introduced -- at the second trial 'proves conduct' that constitutes an offense for which the defendant has already been prosecuted").

reveals that Rev. SHARPTON was prosecuted in New York County for defrauding New York State and City of taxes by hiding his personal income under the cover of the National Youth Movement. The state attempted to prove this scheme to defraud by alleging that Rev. SHARPTON stole money from various persons and businesses, defrauded others to donate monies to the National Youth Movement and then sought to hide this personal income by failing to file a state income tax return for the 1986 tax year and by filing a false and fraudulent return for 1987. (99a) The prosecution opened his case as follows:

> During this trial, ladies and gentlemen of the jury, you are going to hear testimony about thousands of dollars, thousands and thousands of dollars that people paid to [petitioner] in checks made out to the National Youth Movement, but that weren't contributions to the organization.
>
> ***

> All of this money was money he obtained from business dealings but he took it in the name of the National Youth Movement in order to evade paying taxes.
>
> So we are going to prove to you that Al Sharpton's National Youth Movement had three real purposes: One, to get money from charitable donors by means of lies and misrepresentations. Two, to promote and enhance Al Sharpton's position and earnings from the popular music field. And, three, to enable Al Sharpton to hide earnings from the tax authorities. In short, ladies and gentlemen, a scheme to defraud. (131a-132a)

Not only did respondent then proceed to prosecute Rev. Sharpton for these very offenses, he summed up on this very point -- that Rev. SHARPTON engaged in this scheme to defraud on all of the money which was diverted for his personal income.

In Albany County, New York, the government is seeking to prosecute Rev. SHARPTON on solely the tax counts -- not charging there with the larcenies,

falsification of business records and the other acts of a scheme to defraud as he was charged with in New York County. The Albany County indictment is not a different indictment from a substantive point of view, it is merely a subset of the New York County indictment, comprised of the same essential elements and the same conduct and charged under different subsections of the New York State Penal and Tax Laws. Thus, the only difference is that the New York County indictment was a much broader prosecution than will be the Albany County prosecution. The tax offenses are central to both prosecutions. This is exactly why the government spent so much time in the New York County prosecution establishing New York State and City tax authorities as the main persons defrauded or affected in counts

one, six and seven of the New York County indictment.

In applying the Grady analysis to the case at bar, the court below had to identify the elements of the Albany County charges and determine whether to [1] prove any essential element the Attorney General had to prove [2] conduct that constitutes [3] an offense for which Rev. SHARPTON has already been [4] prosecuted. See e.g. Ladner v. Smith, supra. The Second Circuit panel concluded that the two indictments were related in terms of the essential elements of the Albany prosecution and the conduct prosecuted in New York County. It stated:

> Thus, there are two respects in which the two sets of charges are related. First, Count 1 of the New York County indictment is arguably related to Counts 1 and 2 of the Albany County indictment in that the two Albany counts concern evading state income taxes for

> 1987, and the New York count concerns a scheme to defraud ten victims during a period that includes 1987, one of the victims was New York State, and the defendant was alleged to have used the bank account of a charitable organization to conceal his business income from state tax authorities. Second, Counts 6 and 7 of the New York County indictment are arguably related to Count 3 of the Albany County indictment in that the Albany count alleges failure to file a state tax return for 1986, and the New York counts concern falsifying business records in 1986 with the intent to commit two offenses, one of which was the tax crime of failure to file [the other was to defraud New York State of Taxes as embodied in count 1 of the New York County indictment -- scheme to defraud]. (13a-14a)

In refusing to extend the Grady protection to Rev. SHARPTON, the court below found that Rev. SHARPTON was not prosecuted for conduct that constituted an offense in New York County. It stated with respect to counts 1 and 2 of the Albany prosecution:

> Though Sharpton correctly apprehends that in the Albany trial, the State will endeavor to

> prove that he acted so as to defraud the New York tax authorities, we cannot say that such conduct 'constitutes an offense for which the defendant has been prosecuted' in the New York County case....[U]sing the NYM bank account to defraud the State tax authorities is not an offense for which Sharpton was prosecuted in the New York County case.

(23a-24a). With respect to count 3 the court below stated:

> Count 3 [of the Albany County indictment] charges failure to file a 1986 return, and the State alleged in its bill of particulars on counts 6 and 7 of the prior indictment that Sharpton committed acts of misconduct in 1986 that evidenced an intent to violate the 'failure to file' statute. But, as our prior discussion indicates, it cannot be said that Sharpton was prosecuted in the prior case for the offense of failure to file.

(29a-30a). The Second Circuit's additional reasoning for not applying Grady was that the "State contends, however, that the 'income upon which appellant will be tried for evasion of taxes does not include any of the money

that was alleged in his New York County case to have been derived from schemes to defraud, falsification of business records or grand larceny.'" (13a).

In reaching their conclusion, the court below, not only fails to apply this Court's analysis in Grady, but completely ignores respondent's own Bill of Particulars which established unequivocally the conduct for which Rev. SHARPTON was being prosecuted for in New York County and that conduct is identical, in its essential elements, to the conduct for which respondent's seek to prosecute him for in Albany County. Even the New York State Supreme Court, Appellate Division, which reviewed the case on both federal and state law grounds found that the conduct for which Rev. SHARPTON was previously prosecuted for was his ongoing fraudulent use of

the National Youth Movement bank accounts to conceal business income from the State tax authorities. That court's statement is set forth in fotnote 4 supra.

Finally, the court below refused to apply the Grady test to the case at bar on the basis of the respondent's contention that they intend to prove the Albany County charges upon the basis of monies that differ from the monies involved in the New York County case. "First, unlike what occurred in Grady, the State has not made any allegation in its indictment or bill of particulars that it intends to prove counts 1 and 2 of the Albany County charges by proving that Sharpton used the NYM bank account to conceal income from State tax authorities. Thus, even if Grady, applied, which we do not now decide, it

would only preclude the State from proving counts 1 and 2 by relying on the use of the NYM bank account to conceal taxable income, leaving the State free to prove the tax charges by other acts of misconduct." (26a). This position is completely erroneous and the Second Circuit's failure to apply Grady to the facts of the case at bar prior to the second trial is inconsistent with the requirements of Grady.

First, the respondent's contention that they intend to prove the Albany County charges on the basis of other monies and conduct not involved in the New York County prosecution is without foundation and represents a repeated misrepresentation to the courts below by respondent. There is no other money pointed to by respondent's that was not part of the New York County case. See

Petitioner's Statement of the Case, p. 14-19, supra. Second, in footnote 2 of the Second Circuit's decision, the court below noted:

> We would have a different and far more substantial issue if the State had first prosecuted Sharpton for the offense of defrauding tax authorities with respect to taxes due on 1987 income, based on receipt of income from one set of sources, and then proposed to prosecute him again for the same offense, based upon receipt of income from a different set of sources. The pending case does not involve an attempt to divide a tax offense for a single year into two tax offenses, each concerning distinct portions of income.

(25a).

The pending case, however, is attempting to do exactly what the court below said that it wasn't attempting to do and that is to now try to divide the offenses of defrauding tax authorities with respect to taxes due on both 1986 and 1987 income, into two distinct sets of income. Clearly, the court believed

and held that the two sets of charges were related by the fact that the New York County indictment alleged that Rev. Sharpton attempted to defraud tax authorities of income taxes for 1986 and 1987 by engaging in the falsification of business records in counts 6 and 7 of that indictment covering tax year 1986 and by engaging in a scheme to defraud to evade taxes for tax year 1987 in count one of the New York County indictment. (11a).

If that is true, then it doesn't matter whether in Albany County the state will seek to prove the crime of evading taxes in 1986 and 1987 by failing to file a return and filing a false and fraudulent return respectively on the basis of his business income only. That business income is but a subset of the income sought to be proven

in the New York County indictment. The issue for determining whether the second prosecution is barred by Grady, is not what income will be used, but whether Rev. SHARPTON was already prosecuted for engaging in a scheme to defraud New York State of taxes in 1986 and 1987 in the New York County case. Since the Bill of Particulars in the New York County case reveals that he was (97a), then the second prosecution is barred under Grady and the court below erred by not "now" deciding whether Grady applied to the case at bar.

2. The Second Circuit has expanded the holding of U.S. v. Felix in a manner which usurps the authority of this Court and undermines the holding of Grady.

In United States v. Felix, 112 S.Ct. 1377 (1992)[8], this Court held that "prosecution of a defendant for conspiracy, where certain of the overt acts relied upon by the Government are based on substantive offenses for which the defendant has been previously convicted, does not violate the Double Jeopardy Clause." In so holding this Court did not overrule its decision in Grady v. Corbin, 495 U.S. 508 (1990).

The Second Circuit in the case at bar, however, in affirming the district court's decision to dismiss Rev. SHARPTON's claim of double jeopardy, misapprehended this Court's ruling in Felix, giving it a much too expansive reading. In effect, the Second Circuit

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[8] United States v. Felix, supra., was decided after the case at bar had been argued before the Second Circuit.

Panel denied Rev. SHARPTON the protection afforded him by Grady v. Corbin, supra -- a result that this Court's decision in Felix did not intend.

The Felix case is completely distinguishable from Grady v. Corbin, supra, and the case at bar. In Felix, the defendant was named in six counts of a conspiracy indictment in Federal District Court in Oklahoma. The first count of that indictment charged the defendant with conspiracy to manufacture, possess, and distribute methamphetamine, an illegal drug. The other counts charged him with substantive drug offenses. The defendant had been previously convicted in Federal District Court in Missouri, for attempting to manufacture an illegal drug and claimed that his Oklahoma

prosecution was barred by Grady on grounds of double jeopardy.

As to the conspiracy count, this Court ruled in Felix, that based on its holdings in United States v. Bayer, 331 U.S. 532 (1947) and Pinkerton v. United States, 328 U.S. 640 (1946), the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses and the plea of double jeopardy is no defense to a conviction for both offenses. Thus, the "same conduct" test as announced in Grady is not applicable to bar a conspiracy prosecution based on an overt act for which the defendant had already been prosecuted. Additionally, Justice Stevens in his concurring opinion in Felix, further noted that there is no overt act requirement in the federal drug conspiracy statute and therefore,

the facts of Felix did not run afoul of Grady's holding since the overt act is not an "essential element" of the offense charged in the conspiracy count. Id. at 1386.

As to the substantive counts in Felix, this Court found that the "actual crimes charged in each case were different in both time and place; there was absolutely no common conduct linking the alleged offenses. In short, none of the offenses for which Felix was prosecuted in the Oklahoma indictment is in any sense the 'same offense' as the offense for which he was prosecuted in Missouri." Id. at 1382. Again, if there is no common conduct for which one is being prosecuted, then Grady does not bar a subsequent prosecution.

The Second Circuit gave lip service to this distinction (18a-19a) but in

denying Rev. SHARPTON's claim, the Court below relied on the Felix Court majority's statement that "the introduction of relevant evidence of particular misconduct in a case is not the same thing as prosecution for that conduct." 112 S.Ct. 1383. The Court then held that Rev. SHARPTON's double jeopardy claim failed since in the New York County indictment "Sharpton has not been prosecuted for an offense of using the NYM bank account to defraud state tax authorities," with respect to counts one and two of the Albany County indictment and that "it cannot be said that Sharpton was prosecuted in the prior case for the offense of failure to file" a 1986 tax return with respect to count three of the Albany County indictment. (29a-30a)

Rev. SHARPTON maintains that the Court below blurred the distinction between "proof of misconduct" and "prosecution for such conduct" and thereby misapprehended the New York State crimes of scheme to defraud in the first degree and falsifying business records in the first and second degrees. (See New York State Penal Law §§ 190.65, and 175.05, 175.10)

In considering whether counts one and two of the Albany County indictment (the 1987 tax evasion charge) are barred by the prior prosecution of count one in the New York County indictment (the scheme to defraud that included New York State as one of the ten victims), the Second Circuit asked whether Rev. SHARPTON was prosecuted for an offense of using the NYM bank account to defraud state tax authorities. The Panel

decided that he wasn't. However, even if the use of the bank accounts is designated "proof of misconduct," the fact remains that in the first count of the New York County indictment, Rev. SHARPTON was prosecuted for a scheme to defraud, the conduct of which was using these bank accounts to conceal income in order to defraud New York State (and City) of taxes. This, of course, is the very conduct for which he is being prosecuted in Albany County, where it is charged he endeavored to complete the accomplishment of this objective by filing a false return for 1987 and failing to file in 1986.

Likewise, counts six and seven of the New York County indictment did not involve simply proof of intent to commit the tax crime in count three of the Albany indictment -- to wit -- failure

to file a New York State and City tax return with the intent to evade taxes -- as proof of misconduct to constitute the crime of falsifying business records in the first degree, but involved prosecution for the conduct that would constitute the crime alleged in count three of the Albany indictment. To find SHARPTON guilty of counts six and seven of the New York County indictment the jury had to find as a matter of law that he intended to commit a violation of New York State Tax Law §1801(a), failure to file a return with intent to evade taxes and that he falsified business receipts to achieve this objective. It cannot be said that the failure to file in counts six and seven was not conduct for which Rev. SHARPTON was prosecuted and acquitted for. Therefore, prosecution

on count three in the Albany County indictment must be barred.

New York State Penal Law §15.05 defines intent as when a "person acts intentionally, with respect to a result or to conduct described by a statute defining an offense when his conscious objective is to cause such a result or to engage in such conduct." In other words, intent is not some amorphous concept which would require a court to engage in a new analysis of Grady. Intent, under New York State law, is clearly defined as conduct which one engages in. Thus, under count three of the Albany County indictment, intent is not only an essential element, but the most crucial, since mere failure to file a return does not constitute a crime unless accompanied by the intent to evade taxes. To reach this conclusion

does not involve any "extension" of Grady, it merely involves the proper application of Grady.

Finally, the Panel's conclusion that Rev. SHARPTON's New York County indictment involved only "proof of misconduct" relevant to the Albany County indictment as opposed to "prosecution for such misconduct" was made without reference to the Respondent's theory of the New York County prosecution -- a theory -- that was squarely placed before the New York County jury for its consideration and clearly focused on Rev. SHARPTON's efforts to defraud New York State of taxes.

The Panel's decision in the case at bar, misapprehended Felix and improperly applied Felix as opposed to Grady to the facts of this case.

3. The Court Overlooked Ashe v. Swenson

The Second Circuit stated in the case bar:

> Third, though fraudulent use of a bank account to conceal income from state tax authorities is surely evidence of the fraudulent intent necessary to establish various state tax offenses, it is far from clear that such conduct, in and of itself, is a state offense. We need not decide that issue, however, since the jeopardy claim with respect to counts 1 and 2 fails in any event, at least at this pre-trial stage of the litigation.

(28a-29a) On the next page the Panel states, "... Grady does not bar a second prosecution that requires proof of intent simply because that intent has been alleged as an element of a different offense that has previously been prosecuted." (30a)

Conceding for argument the truth of that proposition concerning Grady, it must be asked, in the case at bar, what

is the impact of acquittal on charges of which intent is an essential element on a second prosecution in which the same intent is again an essential element. The answer, Rev. SHARPTON submits is to be found in Ashe v. Swenson, 397 U.S. 439 (1992), which was completely overlooked by the Panel. Rev. SHARPTON contends that intent to evade taxes was not only a specific element of counts 1, 6 and 7 of the New York County indictment, but was the object of all the frauds, falsifications and larcenies charged in the 67 count first prosecution. While, as a logical matter, each and every count could have been defective for some other reason, if the "practical frame... with an eye to all the circumstances" called for by Ashe is used, there is only one conclusion that makes any sense. The element of intent

makes any sense. The element of intent to evade taxes, essential to the Albany Tax prosection has been conclusively negatived by the acquittal in New York County. The Panel appears to overlook in its analysis the fact that Rev. SHARPTON, unlike the defendants in Grady or Felix, was acquitted of all counts in the first trial.

B. THERE EXISTS AMONG THE CIRCUITS CONFLICT AS TO THE REACH OF THIS COURT'S DECISION IN UNITED STATES V. FELIX.

In the case at bar, the Second Circuit applied the principles set forth in United States v. Felix, 112 S.Ct. 1377 (1992), while acknowledging that the case at bar involves only substantive charges. Neither indictment is for conspiracy or continuing criminal enterprise.

Petitioner's research reveals that no other circuit has extended Felix in

this manner. Indeed, every other circuit which has applied Felix to date has limited its application to cases involving conspiracies and continuing criminal enterprises. In United States v. McHan, 966 F.2d 134, 140 (4th Cir. 1992), the Fourth Circuit, considering a double jeopardy claim for two successive conspiracy prosecutions, relied on Felix to distinguish Grady v. Corbin, a case involving two prosecutions with, "both arising out of a "paradigmatic 'single course of conduct.'" (citations omitted) The Court went on to state:

> Only recently the Supreme Court confirmed this method of analysis for multilayered conduct in United States v. Felix, ...141 (sic) U.S...., 112 S.Ct. 1377, 118 L.Ed2d 25 (1992)
>
> ...
>
> It is thus apparent that in this case, in which separate conspiracies, years

> apart, are claimed to be predicate offenses of a continuing criminal enterprise, we should apply the double jeopardy analysis of Garrett, Arnoldt and Felix and not that of Brown or Grady.

Id, at 140-41.

Thus, the Fourth Circuit, unlike the Second Circuit recognizes two categories of cases, conspiracies, calling for the application of Felix and single courses of conduct, calling for the application of Grady. In the case at bar, the Second Circuit rejected this distinction.

United States v. Smith, 963 F.2d 892 (6th Cir. 1992) involved successive prosecution for: (a) continuing criminal enterprise; and (b) interstate travel in furtherance thereof and possession of marijuana. Like the Fourth Circuit in McHan and unlike the Second Circuit in Sharpton, the 6th Circuit recognized two

lines of authority with applicability to two different types of cases:

> To whatever extent Grady may have been considered to have undermined Garrett, therefore, we believe Felix has clarified matters. Clearly, both the holding and reasoning of Garrett survive Grady. In fact, Felix specifically referred to Garrett, and deemed it favorably analogous to the issue presented. Felix, -- U.S. at --, 112 S.Ct. at 1385. ("Reliance on the lesser included offense analysis, however useful in the context of a 'single course of conduct' ... falls short in examining CCE offenses that are based on previously prosecuted predicate acts.") We have no difficulty concluding, therefore, that Garrett remains good law, and that prosecution for both substantive offenses and for CCE offenses for which the substantive offenses serve as the requisite predicate acts does not violate the double jeopardy clause. Just as a defendant may be tried for both an agreement to commit substantive offenses and for committing those offenses, a defendant may be tried for committing substantive offenses and for engaging in conduct that directs a continuing criminal enterprise. Smith's participation in the wrongful conduct of transporting with intent to distribute was properly prosecuted in Michigan, and his participation

> in running a continuing criminal enterprise was properly prosecuted in his Arizona trial.

Id., 893-94.

This conflict between the Second Circuit, on the one hand, and the Fourth and Sixth on the other must be resolved by this Court so that, in the future all circuits will know when to look to Grady and when to look to Felix in deciding double jeopardy claims.

C. WITHOUT THE GRANTING OF THE WRIT OF CERTIORARI IN THE CASE AT BAR, PETITIONER WILL SUFFER IRREPARABLE HARM AND BE DEPRIVED OF HIS RIGHT TO BE FREE OF DOUBLE JEOPARDY.

In Abney v. United States, 431 U.S. 651, 660-62 (1977), this Court emphasized the importance of resolving any claim of double jeopardy prior to the second trial:

> Finally, the rights conferred on a criminal accused by the Double Jeopardy Clause would be significantly undermined if appellate review were

postponed until after conviction and sentence....Because of this focus on the "risk" of conviction, the guarantee against double jeopardy assures an individual that, among other things, he will not be forced to endure the personal strain, public embarrassment, and expense of a criminal trial more than once for the same offence. It thus protects against interests wholly unrelated to the proprietary of a second conviction...Obviously, these aspects of the guarantee's protection would be lost, if the accused were forced to "run the gauntlet" a second time before an appeal could be taken; even if the accused is acquitted, or, if convicted, has his conviction ultimately reversed on double jeopardy grounds, he has still been forced to endure a trial that the that the Double Jeopardy Clause was designed to prohibit. Consequently, if a criminal defendant is to avoid <u>exposure</u> to double jeopardy and thereby enjoy the full protection of the Clause, his double jeopardy challenge to the indictment must be reviewable before that subsequent exposure occurs."

Petitioner respectfully contends that without review by this Court, he will be subjected to precisely that exposure. Indeed, the opinion of Second Circuit denying his double jeopardy claim concedes that this is a difficult and close case. (15a) It is only fair to petitioner and, moreover, consistent with the protection accorded by the double jeopardy clause, that these uncertainties be resolved prior to petitioner being forced to "run the gauntlet " a second time.

Indeed, the Second Circuit leaves open the possibility of double jeopardy issues arising at a second trial:

> ...Whether jeopardy issues might arise from the way the prosecution might prove those charges at trial is beyond the scope of inquiry in this pretrial challenge.

(27a)

With regard to the latter, Rev. SHARPTON asks why is the Attorney General not required to clearly state what he intends to prove at the Albany County trial so that the double jeopardy claim can be decided prior to the second trial. At this point in the appellate process, only full review by this Court can make that happen.

No doubt, a second trial in Albany County will answer these troubling questions. However, such a route to clarity is fraught with peril for Rev. SHARPTON and deprives him of the protection against double jeopardy to which he is constitutionally entitled.

CONCLUSION

For the reasons stated, the writ should be granted.

Respectfully submitted,

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APPENDIX

ORDER DENYING STAY PENDING PETITION FOR CERTIORARI

A stay, under FRAP Rule 41, of trial of petitioner in Albany County pending review of his writ of certiorari to the U.S. Supreme Court of denial of his double jeopardy claim.

IT IS HEREBY ORDERED that the motion be and it hereby is denied.

Filed July 13, 1992

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 29th day of June one thousand nine hundred and ninety-two.

ALFRED C. SHARPTON, Petitioner-Appellant, v. HON. JOHN G. TURNER, JR., Albany County Judge; ROBERT ABRAMS, Attorney General of the State of New York, Respondent-Appellee.	DOCKET NUMBER: 92-2007

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by

Alfred C. Sharpton,

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

UNITED STATES COURT OF APPEALS

FOR THE
SECOND CIRCUIT

No.1091-August Term 1991

(Argued: January 23, 1992
Decided: May 19, 1992)

Docket No. 92-2007

ALFRED C. SHARPTON,

Petitioner-Appellant,

-v.-

HON. JOHN C. TURNER, JR.,
Albany County Judge;
ROBERT ABRAMS, Attorney General
of the State of New York,

Respondents-Appellees,

Before:
NEWMAN and KEARSE, Circuit Judges,
and MARSHALL, Associate Justice Retired*

Appeal from the January 3, 1992,

order of the District Court for the

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* The Honorable Thurgood Marshall of the Supreme Court of the United States, sitting by designation.

Northern District of New York, (Howard G. Munson, Judge) denying petitioner's petition for a writ of habeas corpus to bar, on double jeopardy grounds, a state of prosecution for state tax law violations.

Affirmed.

MICHAEL A. HARDY, New York, N.Y., (Harry Kresky, Int'l Peoples' Law Institution, New York, N.Y. on the brief), for petitioner-appellant.

CHRISTINE DUISIN, New York, N.Y. (Robert Abrams, Atty. Gen., Edward D. Saslaw, Victor Genecin, Asst. Attys. Gen., New York, N.Y., on the brief), for respondents-appellees.

JON O. NEWMAN, Circuit Judge:

This appeal raises the recurring issue of whether a second set of criminal charges is sufficiently similar to a prior set of charges to fall within

the proscription of the Double Jeopardy clause. The issue arises on an appeal by Reverend Alfred C. Sharpton from the January 3, 1992, order of the District Court for the Northern District of New York (Howard G. Munson, Judge) denying his petition for a writ of habeas corpus to bar a state prosecution for state tax law violations. We affirm.

Facts

The two sets of charges underlying Sharpton's double jeopardy claim are contained in two indictments returned by New York grand juries in June 1989 -- a 67-count indictment returned by an Albany County grand jury. The New York County indictment charged five counts of a scheme to defraud, in violation of N.Y. Penal Law § 190.65 (McKinney 1988), two counts of falsifying business records, in violation of N.Y. Penal Law

§§175.05, 175.10 (McKinney 1988), and 60 counts of grand larceny, in violation of N.Y. Penal Law §§155.30, 155.35 (McKinney 1988). The Albany County indictment charged filing a false 1987 state income tax return, in violation of N.Y. Penal Law § 175.35 (McKinney 1988), filing the same return with intent to evade taxes, in violation of N.Y. Tax law § 1804(b) (McKinney 1987), and failure to file a state income tax return for 1986, in violation of N.Y. Tax law § 1801(a) (McKinney 1987).

Sharpton was acquitted, after a jury trial, of all charges in the New York County indictment. The Albany County charges remain pending.

The charges in the New York County indictment arose out of Sharpton's solicitation of funds for the National Youth Movement, Inc. ("NYM"), a

charitable organization operating programs for improving the condition of minority youth. Sharpton identifies himself as president and national chairman of NYM. The New York indictment, as amplified in a bill of particulars, charged that Sharpton solicited and received charitable contributions to NYM on the basis of false representations that the contributions would fund programs for minority youth. The State sought to prove at trial that Sharpton diverted contributions to his personal benefit. The Albany County indictment alleges state tax offenses for two of the same years in which Sharpton was alleged to have diverted NYM contributions, although the State alleges that it will prove the tax charges on the basis of income not derived from the misconduct

charged in the prior prosecution. The charges in the two indictments will be examined in more detail below.

Sharpton's double jeopardy defense was asserted in the state trial court by an unsuccessful motion to dismiss and by an unsuccessful petition for a writ of prohibitions. See Matter of Sharpton v. Turner, 170 A.D.2d. 43, 573 N.Y.S. 2d 328 (3d Dept.), appeal dismissed for lack of a substantial constitutional question, 78 N.Y.2d 1071, 576 N.Y.S.2d 221 (1991). Having exhausted his state court remedies, see Drayton v. Hays, 589 F.2d 117, 120 (2d Cir. 1979), Sharpton then brought the pending habeas corpus petition. Judge Munson denied the petition, agreeing, on the merits, with the recommendation of Magistrate Judge David N. Hurd that the jeopardy defense was unavailing. Judge Munson granted a

brief stay of the pending state court trial, and this Court extended the stay until disposition of this appeal.

Discussion

The bare recital of the offenses charged in the New York County and the Albany County indictments does not reveal the full extent to which the charges are related. That relationship emerges from examination of the bill of particulars filed with respect to the New York County indictment. Count 1 of the New York indictment charged the offense of Scheme to Defraud in the First Degree during the period from January 1, 1985, to January 8, 1988. That offense requires an intent to defraud ten or more persons. N.Y. Penal law § 190.65(1)(a)(Mckinney 1988). The bill of particulars listed New York State as one of the ten persons

defrauded by the scheme alleged in Count 1 and included the following allegation concerning the defendant's conduct with respect to New York State:

> Defendant further used the bank accounts of National Youth Movement, Inc. to conceal from the state tax authorities personal income that he earned from his business activities in the field of entertainment and music promotion.

Bill of Particulars Pursuant to Order Dated October 16, 1989, People v. Sharpton Indictment No. 6761/89 (Supreme Court, N.Y. Cty., Crim. Term.) at 2 (emphasis added.)[1]

Counts 6 and 7 of the New York County indictment charged the offense of Falsifying Business Records in the First Degree. That offense requires the

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[1] The bill of particulars also alleged that the defendant made false representations to the Charities Bureau of the New York Attorney General's office and filed with the State a false Annual Report of Charitable Organization. Id at 7-8.

falsification of business records with an intent to defraud that "includes an intent to commit another crime or to aid or conceal the commission thereof." N.Y. Penal Law § 175.10 (McKinney 1988) (emphasis added). The bill of particulars alleged that on each of two occasions Sharpton received a sum of money from a concert promoter and caused the promoter to draw up receipts showing the money going to NYM, and also alleged that

> By this conduct, defendant sought to commit or conceal the scheme to defraud charged in the first count, as well as violation of Tax law §1801(a).

Bill of Particulars at 17, 18.

The three tax charges alleged in the Albany indictment do not particularize the sources of income for which taxes were not paid for 1986 (counts 1 and 2) or that necessitated

the filing of a return for 1987 (count 3). The State contends, however, that "the income upon which appellant will be tried for evasion of taxes does not include any of the money that was alleged in his New York County case to have been derived from schemes to defraud, falsification of business records or grand larceny." Brief for Appellee at 9. Instead, the State contends, "the income upon which [Sharpton] is alleged to have evaded personal income tax will be limited to his receipts from concert and record promotion activities." Id. at 8.

Thus, there are two respects in which the two sets of charges are related. First, Count 1 of the New York County indictment is arguably related to Counts 1 and 2 of the Albany County indictment in that the two Albany counts

concern evading state income taxes for 1987, and the New York count concerns a scheme to defraud ten victims during a period that includes 1987, one of the victims was New York State, and the defendant was alleged to have used the bank account of a charitable organization to conceal his business income from state tax authorities. Second, Counts 6 and 7 of the New York County indictment are arguable related to Count 3 of the Albany County indictment in that the Albany County indictment in that the Albany count alleges failure to file a state tax return for 1986, and the New York counts concern falsifying business records in 1986 with the intent to commit two offenses, one of which was the tax crime of failure to file. Whether these relationships render prosecution on any

counts of the Albany County indictment barred under the Double Jeopardy Clause after the defendant has been prosecuted for the crimes alleged in the New York County indictment is a close and troublesome question, complicated by the uncertain state of the Supreme Court's double jeopardy jurisprudence.

Prior to Grady v. Corbin, 495 U.S. 508 (1990), we would have been entirely confident that under the previous regime of Blockburger v. United States, 284 U.S. 299 (1932), Sharpton's double jeopardy claim would fail. Blockburger instructed that a subsequent offense is not barred by prosecution for a prior offense if each requires "proof of a fact which the other does not." Id. at 304. The tax offenses charged in the Albany County indictment require the filing of false return (Counts 1,2) and

the non-filing of a required return (Count 3), facts not required for any of the offenses charged in the New York County indictment. And the offenses charged in the New York County indictment require obtaining property by means of a fraudulent scheme (Counts 1-5), falsifying business records (Counts 6, 7), and stealing property (Counts 8-67), facts not required for any of the offenses charged in the Albany County indictment. Sharpton's double jeopardy defense is unsupportable under the Blockburger test.

However, Grady v. Corbin introduced a refinement to the Blockburger test. Grady announced that the Double Jeopardy Clause bars a subsequent prosecution where the prosecutor, "to establish an essential element of an offense charged in that prosecution, will prove conduct

that constitutes an offense for which the defendant has already been prosecuted." 495 U.S. at 521. That formulation has proven difficult to apply, see, e.g. United States v. Claderone, 917 F.2d 717 (2d Cir. 1990); id. at 722 (Newman, J., concurring); id. at 726 (Miner, J., dissenting), and whatever difficulties we have previously encountered in grappling with the Grady language have not been eased by the most recent instructions from the Supreme Court that we are not to read the language "literally," United States v. Felix, 60 U.S.L.W. 4259, 4262 (U.S. March 25, 1992), because doing so is to read the language "expansively," id. Apparently, we are to read the Grady formulation non-literally, and, in any event, narrowly.

Felix confronted the application of Grady to both a conspiracy and a set of substantive charges in a federal Oklahoma indictment for manufacturing and distributing methamphetamine. These charges were claimed to be barred from prosecution by a prior federal Missouri prosecution for attempting to manufacture methamphetamine. The Supreme Court ruled that the Oklahoma conspiracy charge was not barred because, whatever the meaning of Grady, it is not to be understood to have eroded the rule of cases like United States v. Bayer, 331 U.W. 532 (1947), and Pinkerton v. United States, 328 U.S. 640 (1946), that a conspiracy charge is not barred under the Double Jeopardy Clause by the prosecution of a prior substantive charge. Felix, 60 U.S.L. W. at 4263. That ruling, however, has

little bearing on Sharpton's claim because all of the charges in both the Albany County and the New York County indictments are substantive charges.

Nevertheless, the Court's discussion of its conspiracy ruling in Felix does offer some illumination of its thinking as to the proper application of Grady. The Chief Justice's opinion viewed Grady as "simply adopt[ing] the suggestion we had previously made in dicta in [Illinois v. Vitale], [447 U.S. 410 (1980)]," 60 U.S.L.W. at 4263, which was that the earlier prosecuted offense "might be viewed as a 'species of lesser-included offense'" even though it did not technically fit within that designation. Felix, 60 U.S.L.W. at 4262. It will thus be pertinent to our consideration of Sharpton's claim to determine whether

any of the charges in either of the indictments against him can be viewed as a "species of lesser-included offense" within any of the charges in the other indictment. Unfortunately, we are told very little about the taxonomy of this species, but we believe the Court was referring to an offense that is a permissible but not a necessary predicate of a greater offense. In Grady the offenses previously prosecuted--driving while intoxicated and failing to keep right of the median--were permissible but not necessary predicates of the offenses of homicide and assault.

Also relevant to our consideration is the Court's ruling in Felix that the Oklahoma substantive charges were not barred by prosecution of the prior Missouri substantive charges. Here

again, the actual ruling is of little pertinence to our case since the Court could say of the two sets of charges against Felix that "there was absolutely no common conduct linking the alleged offenses." id. at 4261, an observation that is not true of the two sets of charges against Sharpton. But, again, the Court's discussion is significant. The Court rejected the jeopardy defense despite its apparent acknowledgement that conduct establishing the Oklahoma substantive offenses -- Felix's Oklahoma methamphetamine transactions -- had been previously relied on by the prosecution to prove the element of intent at the Missouri trial. The Chief Justice emphasized "the basic, yet important, principle that the introduction relevant evidence of particular misconduct in a case is not the same thing as

prosecution for that conduct." Id. at 4262 (footnote omitted). The Court concluded that in Felix's Missouri case the Government "did not in any way prosecute Felix for the Oklahoma methamphetamine transactions. . . " Id. We learn that the prosecutor's use of conduct to prove an element of an offense is not necessarily "prosecution" for such conduct within the meaning of the Grady formulation (and was not "prosecution" in Felix's first trial).

With this guidance, we endeavor to apply Grady and Felix to Sharpton's claim.

A. Counts 1 and 2 of the Albany County Indictment

Considering first whether counts 1 and 2 of the Albany County indictment (the 1987 tax evasion charges) are barred by the prior prosecution of count

1 of the New York County indictment (the scheme to defraud that included New York State as one of ten victims), we inquire whether, in Grady's terms, "to establish an essential element of" counts 1 or 2 of the Albany County indictment, the state prosecutor "will prove conduct that constitutes an offense for which the defendant has already been prosecuted" in the trail of count 1 of the New York County indictment.

Even if we were to read the Grady formulation literally, we could not conclude that its proscription will be violated by prosecution on counts 1 and 2 of the pending Albany indictment. Though Sharpton correctly apprehends that in the Albany trial, the State will endeavor to prove that he acted to as to defraud the New York tax authorities, we cannot say that such conduct

"constitutes an offense for which the defendant has been prosecuted" in the New York County case. It is true that one act of an alleged defrauding of the tax authorities was charged at the first trial. New York State was alleged to have been one of the ten victims of the scheme to defraud, and the bill of particulars specifically alleged that one of the means of defrauding the State was the use of NYM bank accounts to conceal personal income from the State tax authorities. Nevertheless, using the NYM bank account to defraud the State tax authorities is not an offense for which Sharpton was prosecuted in the New York County case. Use of the account may well be conduct that was offered to prove the scheme to defraud, but Felix instructs that <u>proof</u> of

conduct must be carefully distinguished from prosecution for such conduct.[2]

Arguably the fraudulent use of the NYM bank account to defraud the State tax authorities is a "species " of lesser-included offense within the offense of a scheme to defraud ten or more victims in the same sense that driving while intoxicated and failing to keep right of the median were a "species" of lesser-included offenses within the homicide and assault offenses in Grady. But there are at least three

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[2] We would have a different and far more substantial issue if the State had first prosecuted Sharpton for the offense of defrauding tax authorities with respect to taxes due on 1987 income, based on receipt of income from one set of sources, and then proposed to prosecute him again for the same offense, based on receipt of income from a different set of sources. The pending case does not involve an attempt to divide a tax offense for a single year into two tax offenses, each concerning distinct portions of income.

obstacles to upholding Sharpton's claim on that ground at this stage. First, unlike what occurred in Grady, the State has not made any allegation in its indictment or bill of particulars that it intends to prove counts 1 and 2 of the Albany County charges by proving that Sharpton used the NYM bank account to conceal income from State tax authorities. Thus, even if Grady applied, which we do not now decide, it would only preclude the State from proving counts 1 and 2 by relying on the use of the NYM bank account to conceal taxable income, leaving the State free to prove the tax charges by other acts of misconduct. Cf. Grady, 495 U.S. At 523 (subsequent homicide prosecution not barred if state would establish negligence or recklessness by conduct for which defendant had not been

prosecuted, e.g., driving too fast for conditions). In this pretrial habeas corpus challenge to the indictment, the issue is only whether the charges are necessarily barred by the prior prosecution. Whether jeopardy issues might arise from the way the prosecution might prove those charges at trial is beyond the scope of inquiry in this pre-trial challenge.

Second, Grady's concern with a "species" of lesser-included offense appears to be limited to situations where the prosecution seeks to prove a greater offense by some conduct that formed the entirety of a lesser offense previously prosecuted. Grady had been prosecuted for the offenses of driving while intoxicated and failing to keep right of the median. Sharpton has not been prosecuted for an offense of using

the NYM bank account to defraud state tax authorities. Even if such conduct is a state offense, it was not the conduct for which Sharpton was prosecuted but, at most, only a permissible predicate for the scheme to defraud with which he was charged. Nothing in Grady, as illuminated by Felix, would prevent proof of offense A by evidence of conduct that is a lesser-included offense B within a previously prosecuted greater offense C.

Third, though fraudulent use of a bank account to conceal income from state authorities is surely evidence of the fraudulent intent necessary to establish various state tax offenses, it is far from clear that such conduct, in and of itself, is a state offense. We need not decide that issue, however, since the jeopardy claim with respect to

counts 1 and 2 fails in any event, at least at this pre-trial stage of litigation.

B. Count 3 of the Albany Count Indictment

Turning to count 3 of the Albany County indictment, we inquire whether, in Grady's terms, "to establish an essential element of" count 3, the state prosecutor "will prove conduct that constitutes an offense for which the defendant has already been prosecuted" in the trial of counts 6 and 7 of the New York County indictment. Count 3 charges failure to file a 1986 return, and the State alleged in its bill of particulars on counts 6 and 7 for the prior indictment that Sharpton committed acts of misconduct in 1986 that evidenced an intent to violate the "failure to file" statute. But, as our

prior discussion indicates, in cannot be said that Sharpton was prosecuted in the prior case for the offense of failure to file.

Without doubt, the intent to commit the offense of failure to file in 1986, which the prosecution sought to prove as an element of counts 6 and 7 at the first trial, is an element of the "failure to file" offense charged in count 3 of the pending indictment. But, unless a lesser-included offense is involved, Grady does not bar a second prosecution that requires proof of intent simply because that intent has been alleged as an element of a different offense that has previously been prosecuted. The Grady formulation concerns "conduct" previously prosecuted, and, though a similar analysis could be constructed to apply

to the more amorphous concept of "intent", we have been advised in Felix to avoid any extension of Grady.

Prior to Grady it was settled law that the Double Jeopardy Clause did not bar prosecution from tax offenses arising out of misconduct that had formed the basis of a prior prosecution for non-tax offenses. See United States v. Jacobson, 547 F.2d 21, 24 (2d Cir. 1976), cert. denied, 430 U.S. 946 (1977). Though Grady may have eroded the force of Jacobsen in circumstances, we believe, in light of Felix, that we are not to deem prosecution of tax offenses barred simply because they bear some relationship to prior non-tax prosecutions. For the reasons already discussed, we are satisfied that the two indictments do not bear that degree of relationship that renders the second

prosecution barred by the Double Jeopardy Clause.

New York could easily have avoided this controversy by charging Sharpton in one indictment with obtaining funds improperly and failing to observe tax obligations with respect to those funds. Cf. United States v. Biaggi, 909 F.2d 662, 676 (2d Cir. 1990), cert. denied, 111 U.S. 1102 (1991); United States v. Turoff, 853 F.2d 1037, 1043 (2d Cir. 1988). By pressing what it perhaps perceived to be the tactical advantage of trying the defendant first for non-tax offenses and later for tax offenses, the State has precipitated a needless controversy. On the other hand, in view of the State's concession that it will seek to prove the tax offenses only on the basis on income not derived from offenses prosecuted in the first

prosecution, the State may have afforded Sharpton a fairer trial on the New YOrk County charges than would have ensued if that trial had included evidence of all the income on which he is alleged to have avoided tax obligations.

The judgment of the District Court is affirmed.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 19th day of May, one thousand nine hundred and ninety-two.

PRESENT: HON. JON O. NEWMAN
HON. AMALYA L. KEARSE
Circuit Judges,

HON. THURGOOD MARSHALL
Associate Justice
Retired*

ALFRED C. SHARPTON,

Petitioner-Appellant,

-v.- 92-2007

HON. JOHN C. TURNER, JR., Albany County Judge; ROBERT ABRAMS, Attorney General of the State of

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* The Honorable Thurgood Marshall of the Supreme Court of the United States, sitting by designation

New York,

Respondents-Appellees.

Appeal from the United States District Court for the Northern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Northern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ORDERED, ADJUDGED and DECREED that the order of said district court be and it hereby is affirmed in accordance with the opinion of this court with costs to be taxed against the appellant.

ELAINE B. GOLDSMITH, Clerk
By:

/s/ Edward J. Guardaro
Staff Attorney

[stamped]
U.S. Court of Appeals
Second Circuit

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

UNITED STATES OF AMERICA, ex. rel.
ALFRED C. SHARPTON,

Relator Apellant,

92-2007

-v.-

HONORABLE JOHN G. TURNER,
Albany County Judge
ROBERT ABRAMS, Attorney General
of the State
of New York,

Res-Appellees.

Before: HON. GEORGE C. PRATT
HON. ROGER J. MINER
Circuit Judges

Relator-Appellant herein has filed a motion for a stay pending appeal which motion was argued by counsel.

Upon consideration thereof, it is

ORDERED that the stay be and it hereby is GRANTED and the appeal is Expedited.

In light of the importance of this action the appeal shall be heard during the week of January 21, 1992, subject to the approval of the presiding judge of that panel. Counsel for the parties have agreed to cooperated and work with each other and will simultaneously file, by hand, their briefs and a joint appendix by 12 Noon Friday, January 17, 1992. The record on appeal will be filed in the Clerk's office together with the briefs.

Elaine B. Goldsmith, Clerk
By:

/s/ Edward J. Guardaro
Dep. Clerk

DATED: January 19, 1992

[stamped]
United States Court of Appeals
Second Circuit

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, ex. rel. ALFRED C. SHARPTON,

Petitioner,

vs. 91-CV-1470

HONORABLE JOHN C. TURNER, JR., Albany County Judge; and ROBERT ABRAMS, Attorney General of the State of New York,

Respondents.

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RICHARD ERNST, ESQ.

HOWARD G. MUNSON, SR. J.

ORDER

The above matter comes to me following a Report-Recommendation by Magistrate Judge David N. Hurd, duly filed on December 31, 1991. After careful review of all of the papers in the record before the court, including the Magistrate's Report-Recommendation and the objections submitted thereto, and the oral argument heard on January 2, 1992 in Albany, new York, it is

ORDERED that:

1. The Report-Recommendation is hereby approved with the exception of the final sentence on page 7, continuing onto page 8, wherein the Magistrate stated that "the court may nevertheless refuse to entertain this application at this point based on the principles of comity and federalism." The Second Circuit took the exact opposite position

in Drayton v. Hays, 589 F.2d 117, 120 (2d Cir. 1979), where it held that "once the petitioner has exhausted his state remedies, there is no further bar to the assumption of federal jurisdiction, for the deference owed to the state judicial system demanded by principles of comity and federalism has been paid." Nevertheless, this exception is immaterial to the analysis of the Magistrate and does not affect the conclusion that the pending prosecution of the Albany County Indictment No. 4021/89 against petitioner does not violate the Double Jeopardy Clause of the United States Constitution under the standards set forth by the Supreme Court in Blockburger v. United States, 284 U.S. 299 (1932), and Grady v. Corbin, 495 U.S. 508, 110 S. Ct. 2084 (1990). This conclusion and the magistrate's

analysis are therefore adopted with the exception noted above.

2. Petitioner's request for a Certificate of Probable Cause for an appeal to the Second Circuit Court of Appeals is granted.

3. The proceedings scheduled to commence on January 6, 1992 in Albany County on Indictment No. 4021/89 are hereby stayed until January 8, 1992 to provide the Second Circuit an opportunity to review the claim asserted in this habeas corpus petition.

It is So Ordered.

Dated: January 3, 1992
Albany, New York

/s/ HOWARD G. MUNSON
SENIOR UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, ex. rel. ALFRED C. SHARPTON

Relator,

vs

HONORABLE JOHN G. TURNER, JR., ALBANY COUNTY JUDGE; ROBERT ABRAMS, ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Respondents.

HOWARD C. MUNSON
Senior Judge

91-cv-1470

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EDWARD SASLAW, ESQ.
Asst. Attorney General

DAVID N. HURD
United States Magistrate Judge

REPORT-RECOMMENDATION

This matter was referred to the undersigned for a Report and Recommendation by Senior Judge Howard G. Munson, by Standing Order dated August 2, 1985.

The relator (petitioner), on December 30, 1991, filed with this court a writ of habeas corpus and an order to show cause seeking an order staying his criminal trial scheduled to begin on January 6, 1992, in the Albany County Court. The petitioner has served his petition and a copy of the order to show cause upon the respondents. On the afternoon of December 30, 1991, this Court conducted a telephone conference with the attorneys for the parties concerning the petitioner's application for a stay. On December 31, 1991, the attorneys for the parties appeared

before this Court and orally argued their respective positions regarding the petitioner's application for a stay.

F A C T S

On June 27, 1989, the petitioners was indicted by a New York County Grand Jury. The indictment consisted of sixty-seven counts - five counts alleging a scheme to defraud, two counts alleging falsification of business records, and sixty counts of grand larceny. At the same time the petitioner was being indicted by the New York County Grand Jury, he was also indicted by a grand jury in Albany County, New York. The Albany County Grand Jury indicted the petitioner for one count of filing a New York State tax return with false information for the year 1987, one count of understating his tax liability on his 1987 tax return,

and one count for failing to file a New York State tax return for the 1986 tax year.

The petitioner was tried on the New York County indictment from March 19, to July 2, 1990, with the trial ending in his acquittal on all counts. The petitioner then brought a motion before Albany County Court Judge John G. Turner, seeking a dismissal of the Albany County indictment on the grounds that it would violate the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution for him to be tried on that indictment.[1] The petitioner's application to have the indictment dismissed on double jeopardy grounds was dismissed by Judge Turner on

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[1] The petitioner also alleged that it would violate New York statutory law to be tried on the Albany County indictment.

March 7, 1991. The petitioner then commenced a proceeding in the Appellate Division, Third Department, pursuant to New York Civil Practice Laws and Rules, Article 78, seeking a writ of prohibition, restraining respondents from proceeding with the trial of the Albany County indictment. In a written decision dated August 1, 1991, the Appellate Division, Third Department, held, inter alia, that the prosecution in the Albany County indictment is not barred by the Double Jeopardy Clause of the United States Constitution. Matter of Sharpton v. Turner, 170 A.D. 2d 43 (3d Dept. 1991). The petitioner filed a notice of appeal in the New York Court of Appeals which was dismissed by that Court on October 22, 1991. Matter of Sharpton v. Turner, 78 N.Y. 2d 1071 (1991). Thereafter, the petitioner

filed a motion for permission to appeal to the Court of Appeals which as denied on December 23, 1991. Matter of Sharpton v. Turner, ____N.Y.2d ____, (1991).

The trial on the Albany County indictment is schedule to commence on January 6, 1992, Petitioner argues that if this Court does not issue an order staying the state court proceedings, he will be forced to undergo a second trial for the same conduct upon which he was acquitted in New York County in violation of the Double Jeopardy Clause of the United States Constitution. According to the petitioner, the first count of the New York County Grand Jury indictment charged that between 1985 and 1988, he schemed to defraud at least ten or more persons by soliciting and receiving charitable contributions to

the National Youth Movement (NYM) on the basis of false representations that these contributions would fund programs for young minorities. It was also alleged under the first Count that petitioner used the bank accounts of the NYM to conceal from the tax authorities of the State and City of New York, income that he earned from business activities in the field of entertainment and music promotion. The second through fifth Counts in the indictment charged petitioner with a scheme to defraud in connection with fund raising ventures that he undertook in the name of the NYM in the years 1985-1987. In Count six and seven of the New York County indictment, petitioner was charged with falsifying business records by making it appear that her received cash and concert tickets form concert promoters

on behalf of the NYM. The indictment alleged that by falsifying these business records, he intended to commit or conceal this conduct in violation of the New York State Tax law §1801(a). The remainging counts of the New York County indictment charged the petitioner with theft of contributions to the NYM from individual donors.

The petitioner contends that Counts 1, 6 and 7, by their very nature, implicitly charge that he deprived the State of New York of tax revenues which is precisely what he is charged with in the Albany County indictment. The petitioner contends that the Attorney General has stated in papers that were filed in the Appellate Division, Third Department, that the prosecution of the Albany County indictment involves his business earnings. Petitioner alleges

that a central element of the prosecution of the Albany County indictment is his obtaining of income in a manner and intent to avoid the payment of taxes on the income. Petitioner argues that the Appellate Division, Third Department, specifically found that the Attorney General's bill of particulars and opening statement to the jury in the New York County prosecution, as well as the evidence presented at that trial, attempted to prove that petitioner was engaged in a criminal transaction encompassing the years 1986 and 1987, and to defraud the State by evading the payment of income taxes. See Matter of Sharpton, 170 A.D. 2d at 47.

Petitioner insists that the New York County prosecution was for gathering income from a variety of sources in such a manner as to conceal

it from the State Tax Authorities with the intent to defraud the State of New York, and that this conduct is a necessary element of each count in the Albany County indictment. The petitioner contends that in the Albany County prosecution, the Attorney General will attempt to show he failed to file a tax return in 1986, in an effort to intentionally defraud the State of New York on taxes due from income he earned and concealed in 1986, and that he falsely underestimated his 1987 income by leaving out significant amounts of income earned in 1987. The petitioner states that by acquitting him on counts 1, 6 and 7, the jury in his New York County prosecution found that he neither came about the money as the Attorney General claimed, nor did he intentionally defraud the State of New York.

The Attorney General claims that the New York prosecution focused upon petitioner's operation of NYM during the years 1985-1987. The Attorney General concedes that the petitioner derived some, but not all, of his income in 1986 and 1987, from the larcenies charged in the New York County indictment, and he used NYM bank accounts to conceal part of his non-larcenous income. The Attorney General argues that in view of the jury's verdict in the New York County prosecution, he intends to prove the allegation in the Albany County indictment without having to show that the monies contributed to NYM constitutes income to the defendant. In other words, the alleged income petitioner has failed to pay taxes on are monies that he received from his record and concert promotions, and the Attorney General

claims that is what the Albany County indictment is based upon. The Attorney General contends that the income which the Albany County prosecution rests in no way includes any of the money that was alleged in the New York County prosecution to have been derived from schemes to defraud, falsification of business records, or grand larceny. The Attorney General insists the petitioner's classification that the two indictments are for "income gathering activity" is a mischaracterization, since the Albany Count indictment is for specific criminal acts undertaken by the petitioner with the intent to evade paying taxes on his lawful income. Although the method in which he obtained his income was relevant to the New York County prosecution, the Attorney General argues that the Albany County indictment

does not charge him with coming about the income illegally, since it is assumed that he received the income lawfully, but rather it is his failure to report it on his income tax returns which is why he was indicted.

DISCUSSION

At the outset, the Court feels compelled to address the jurisdictional concerns that often arise in a proceeding of this mature. In his habeas corpus petition, the petitioner claims that the Attorney General's attempt to prosecute him on the Albany County indictment violates the Double Jeopardy Clause of the United States Constitution. The petitioner has clearly raised a federal claim which is cognizable in a habeas corpus proceeding. See Justices of Boston

Municipal Court v. Lydon, 466 U.S. 294 (1984). Having concluded that petitioner raises a federal claim, it becomes necessary for the Court to determine whether he has exhausted his state remedies. See 28 U.S.C. § 2254. The Court is satisfied that the petitioner has raised his double jeopardy claim before the state courts, and he has fully exhausted this claim. It is apparent that petitioner has no further avenues available to him in the Courts of the State of New York regarding this claim.

Although this Court has jurisdiction to hear the petitioner's petition, and he has exhausted his state remedies, this Court may nevertheless refuse to entertain this application at this point based on the principles of comity and federalism. The Second

Circuit , in addressing whether a District Court can entertain a petition for a writ of habeas corpus alleging the violation of the Double Jeopardy Clause prior to the petitioner's retrial, stated that, "The Double Jeopardy Clause provides protection, not only from exposure to repeated risks of conviction, but from the ordeal of multiple trials." Drayton v. Hayes. 589 F.2d 177, 120-121 (2d Cir. 1979) [citation omitted]. The Drayton court stated that, "Subjecting an individual to a second trial ...may be exceedingly unfair because of the emotional stress, and the prolonged stigma, stemming from an unresolved accusation, it engenders." Id. The Drayton court determined that to require a petitioner to raise the Double Jeopardy claim after his second trial would, in effect, render the

rationale, as well as the practical effect of the Double Jeopardy Clause meaningless. Id. However, the Attorney General is correct that the mere fact that a petitioner asserts a claim that the Double Jeopardy clause would be violated because he is going to be subjected to a criminal trial is not sufficient to warrant the intervention of the federal courts in a state criminal proceeding. The Court believes that it is exceedingly rare that the Double Jeopardy Clause is raised by a petitioner in a habeas corpus proceeding, and in balancing the inconvenience to the respondent and the court when the claim is raised against the petitioner's right to be free from double jeopardy, the scales tip in favor of the federal courts entertaining requests to stay state proceedings. It

is for this reason that the Court believes it is necessary to examine the petitioner's application for a stay, keeping in mind that the Court is making only a preliminary review of the meritorious nature of his claim. If this Court finds it to be lacking in merit, then the application for a stay should be denied. However, if there is some reasonable basis to conclude that the claim has merit and will ultimately be successful, then the Court will recommend that a stay be issued.

A claim by a petitioner that his prosecution will violate the Double Jeopardy Clause of the United States Constitution calls upon a federal court to apply the Blockburger test. The Blockburger test requires the court to determine whether the offense charged in the petitioner's subsequent prosecution

"requires proof of a fact which the other does not." Blockburger v. United States 284 U.S. 299, 304 (1932). If the test application reveals that the petitioner's prior trial involved an offense which has the identical elements as the one in his second trial, or the offense in either trial is a lesser included offense of the other, then the inquiry must cease, and the subsequent prosecution is barred. However, if the offense does not involve the same elements, or are not lesser included offenses, this is not the end of the inquiry. The Court must then apply the Grady "same conduct test." The Grady test, "bars a subsequent prosecution if, to establish an essential element of an offense charged in that prosecution, the government can prove conduct that constitutes an offense for which the

defendant has already been prosecuted." Grady v. Corbin, 495 U.S. 508, 110 S.Ct. 2084, 2087 (1990). The Grady test speaks of conduct, not evidence, so the presentation of specific evidence in one trial does not forever prevent the government from introducing that same evidence in a subsequent proceeding. Id. , 495 U.S. at ____, 110 S. Ct. at 2093.

In the present case, the Court does not find the petitioner's Albany County prosecution to violate either the Blockburger or the Grady test. In applying the Blockburger test, it becomes apparent that the offenses for which petitioner was acquitted in New York County, alleged acts of fraud and larceny in procuring charitable contribution for the NYM during the periods of 1985-1988, are not the

subject of the Albany County indictment. The Albany County indictment alleges he failed to file a tax return for tax year 1986, that he filed a false return in 1987, and under reported his income for that year. The Albany County prosecution requires proof of a fact which his New York County prosecution did not -- that he failed to file a tax return in 1986, and that he intentionally under reported his income on his 1987 tax return. The New York County prosecution dealt with the petitioner's operation of the NYM and whether he engaged in a scheme to defraud individuals to donate to the NYM under the guise that it was an organization that existed for purely charitable purposes. Although the petitioner's Albany County's indictments will involve evidence as to the source of his income, which was the subject of

the New York County prosecution, it does not call into question the propriety of how he came about the income, but rather whether he did in fact receive in income, and whether he reported it on his tax return. See United States v. Jacobson, 547 F.2d 21 (2nd Cir. 1976) cert. denied, 430 U.S. 946 (1977).

This does not end the Court's inquiry, since the petitioner contends that the central element of the Albany County indictment is the manner in obtaining income, and with the intent to avoid paying taxes, the very same conduct he claims he was acquitted of by the New York County jury. The petitioner insists that he was prosecuted in New York County for "income gathering activity" so as to conceal it from the state tax authorities with the intent to defraud

the State, and that this conduct is an essential element of the Albany County prosecution.

The Attorney General will not have to establish that an essential element of the offenses charged in the Albany County indictment was conduct which constitutes an offense for which the petitioner was prosecuted in New York County. The necessary elements of petitioner's Albany County trial will be that he derived income, regardless of the source, and that he failed to file (1986) or failed to report it on his income tax return (1987). The petitioner's New York County prosecution did not involve his failure to report income on his tax returns. It appears from the papers submitted on this application, that the only mention of petitioner's tax returns in New York

County was the introduction in evidence of his 1987 tax return. No mention at all was made of failure to file in 1986. As the Supreme Court pointed out in Grady, the critical inquiry of the same conduct is not whether the evidence introduced at a subsequent trial was used in a prior prosecution, but rather what conduct the state will prove. Grady, 495 U.S. at ____., 110 S. Ct.., at 2093. Here, the Attorney General will attempt to prove that petitioner evaded income taxes, conduct which was to the subject of his New York County prosecution. See Jacobson, 547 F.2d at 23. It is of no avail for the petitioner to argue that since the State, in the New York County prosecution, had to prove he intentionally misrepresented income on his 1987 tax return, that this involves

the same conduct. Although the State will have to prove in Albany County that petitioner failed to file, and intentionally filed a false return, this is entirely different from having to prove that he obtained charitable contributions for the NYM by intentionally defrauding the State and other individuals.

Furthermore, the petitioner's argument that the doctrine of collateral estoppel also precludes the Albany Count prosecution is unavailing. For the reasons set forth above, the Court rejects this argument and notes that the New York County prosecution did not address the issue of petitioner's report on his personal income to the Sate of New York.

In addition to finding that petitioner has not, at this stage of the

proceedings, demonstrated for purposed of a stay, that the Albany County prosecution would violate the Double Jeopardy clause, which respect to Courts 1 and 2 of the indictment regarding his 1987 tax returns, the petitioner has entirely failed to show that his failure to file a 1986 tax return (Count 3) was addressed in the New York County prosecution.

Accordingly, it is

RECOMMENDED, that petitioner's application for a stay of his Albany County trial scheduled to commence on January 6, 1992, be denied; and it is

ORDERED, that the Clerk of the Court shall forward this Report-Recommendation by FAX transmission to Senior Judge Howard G. Munson, and the attorneys for both parties; and it is further

ORDERED, that the ten (10) day period provided by 28 U.S. C. § 636 (b)(1), for the parties to file written objections to the foregoing Report is dispensed with, and the parties are directed to make any objections to this Report in letter form to the Honorable Howard G. Munson, and to deliver said objections on or before January 2, 1992, to the Clerk's office at the James T. Foley Federal Courthouse in Albany, New York, and that argument regarding said objections will be conducted at 4:00 o'clock on January 2, 1992, before the Honorable G. Munson, at the James T. Foley Federal courthouse in Albany, New York.

/s/ David N. Hurd
United States
Magistrate Judge

Dated: December 31, 1991
Utica, New York

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty-third day of December A.D. 1991

Present, HON. SOL WACHTLER, Chief Judge, presiding.

3-12 Mo. No. 1340
In the Matter of Alfred C. Sharpton,

Appellant,

v.

John G. Turner, Jr., as Albany County Court Judge, et al.,

Respondents.

A motion for leave to appeal to the Court of Appeals and for a stay in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion for leave to appeal be and the same hereby is denied; and it is

ORDERED, that the said motion for a stay be and the same hereby dismissed as academic.

/s/ Donald M. Sheraw
Clerk of the Court

SUPREME COURT -- APPELLATE DIVISION
THIRD JUDICIAL DEPARTMENT

Decided and Entered:
August 1, 1991 63124

In the Matter of
ALFRED C. SHARPTON,

Petitioner,

v.

OPINION
AND
JUDGEMENT

JOHN G. TURNER JR.,
as Albany County
Court Judge, et al.,

Respondents.

Calendar Date: June 6, 1991

Before: Mikoll, J.P. Yesawich Jr.,
Mercure, Crew III and Harvey, JJ.

Michael A. Hardy and Harry Kresky,
New York City, for petitioner.

Robert Abrams, Attorney-General
(Victor Genecin of counsel), New York
City, for respondents.

Crew III, J.

Proceeding pursuant to CPLR article 78 (initiated in this court pursuant to

CPLR 506 [b] [1]) to prohibit respondents from trying petitioner in the County Court of Albany County on a multicount indictment.

Petitioner was tried and acquitted in Supreme Court, New York County, for the crimes of scheme to defraud in the first degree, falsifying business records in the first degree and grand larceny in the third and fourth degrees. In this CPLR article 78 proceeding, petitioner seeks to prohibit his subsequent prosecution in the County Court of Albany County for the crimes of offering a false instrument for filing in the first degree, filing a false or fraudulent return and failure to file a return or report on the ground that such prosecution would constitute double jeopardy.

The facts necessary for resolution of this case are not in dispute. The New York County trial focused on alleged crimes arising from petitioner's operation of the National Youth Movement during the years 1985 through 1988. That organization was dedicated to improving the condition of minority young people. The indictment charged and the Attorney General attempted to prove that petitioner fraudulently sought contributions from individual donors to the National Youth Movement which he converted to his personal use. The indictment also alleged that petitioner falsified business records of two corporate entities whereby he caused them to prepare receipts that made it appear that monies paid to petitioner for concert promotion activities constituted contributions to the

National Youth Movement. The indictment further charged petitioner with scheme to defraud in connection with specific fund-raising ventures that he undertook in the name of the National Youth Movement. Among those that petitioner was alleged to have defrauded was the State in that petitioner used bank accounts of the National Youth Movement to conceal business income from the tax authorities, thereby evading State income taxes. In the Albany County indictment, petitioner is charged with offering a false instrument for filing in connection with is 1987 State income tax return, filing a false return in connection with the same instrument and failure to file a State income tax return in 1986.

Petitioner contends that the prosecution of the Albany County

indictment is proscribed by the recent holding of the United States Supreme Court in Grady v Corbin (___US___, 110 S Ct 2084). We disagree. In that case, the Supreme Court established a two-prong test to determine whether a subsequent prosecution violates the Double Jeopardy Clause of the 5th Amendment of the United States Constitution (id.). Initially it must be determined whether the successive prosecution violates the test established in Blockburger v. United States (284 US 299) Under Blockburger, double jeopardy does not occur where the offenses involved in the successive trials each require proof of a fact which the other does not. That is clearly the case here. However, even if the subsequent prosecution does not run afoul of Blockburger, the Double

Jeopardy Clause will bar the subsequent prosecution if, in order to establish and essential element of an offense charged, the People will prove conduct that constitutes an offense for which the defendant was previously prosecuted (Grady v Corbin, supra, at 2087).

In the case at bar, the conduct for which petitioner was previously prosecuted was his ongoing fraudulent use of National Youth Movement bank accounts to conceal business income from the State tax authorities. Clearly that conduct will not be utilized to prove that he offered a false instrument for filing, filed a false income tax return or failed to file an income tax return. Petitioner contends, however, that in order to establish the crimes charged in the first two counts of the Albany County indictment the People, of

necessity, will have to prove that petitioner filed a 1987 income tax return, that he knew the return contained false information and that this false information was provided with the intent to defraud the State. Petitioner further argues that since the 1987 return was used as evidence in the New York County prosecution, its subsequent use in Albany County would violate the dictates of Grady v Corbin (supra). We disagree. As the Supreme Court pointed out, it was not creating as "actual evidence" or "same evidence" test (id., at 2093). " The critical inquiry is what conduct the State will prove, not the evidence the State will use to prove that conduct" (id). While the 1987 return was used in the New York County prosecution as evidence of petitioner's intent to defraud, it was

not the "conduct" for which he was being prosecuted and there is no prohibition to its use in the Albany County trial (see, Dowling v. United States, 493, US 342).

The remaining question is whether petitioner may be prosecuted in Albany County without violating this State's generous statutory double jeopardy provisions. Resolution of that questions turns on the meaning and reach of CPL 40.20 which, insofar as pertinent, reads:

> 2. A person may not be separately prosecuted for two offenses based upon the same act or criminal transaction unless:
>
> * * *
>
> (b) Each of the offenses as defined contains an element which is not an element of the other, and statutory provisions defining such offenses are designed to prevent very difficult kinds of harm or evil
>
> * * * .

Respondents contend that the Albany County prosecution is not based on the same act or criminal transaction for which petitioner was prosecuted in New York County and does not, therefore, violate the provisions of CPL article 40. Insofar as pertinent a "criminal transaction" is defined as "conduct which establishes at least one offense, and which is comprised of *** a group of acts *** so closely related in criminal purpose or objective as to constitute elements or integral parts of a single criminal venture" (CPL 40, 10 [2] [emphasis supplied]. Contrary to respondents' contention, by including the State as a victim of the alleged scheme to defraud, the Attorney-General brought the ambit of his activity squarely within the scope of the offenses charged in the Albany County

indictment. In the bill of particulars furnished to that petitioner in the New York County prosecution, the People asserted that petitioner "used the bank accounts of the National Youth Movement, inc. to conceal from the state tax authorities personal income that he earned from his business activities in the field of entertainment and music promotion." In their opening to the jury, the People asserted that:

> There was also a third purpose to the National Youth Movement, and this was to have an organization name and a bank account in which [petitioner] could conceal his earnings.
>
> During this trial, ladies and gentlemen of the jury, you are going to hear testimony about thousands of dollars, thousands and thousands of dollars that people paid to [petitioner] in check made out to the National Youth Movement, but that weren't contributions to the organization.

* * *

> All of this money was money he obtained from business dealings but he took it in the name of the National Youth Movement in order to evade paying taxes.

Thus, it is clear that the theory of the People's case in New York County and the proof adduced in support thereof was that petitioner was engaged in a criminal transaction encompassing the years 1986 and 1987 to defraud the State by evading income taxes. Petitioner's alleged filing of a false 1987 tax return and his failure to file a 1986 return are acts which are clearly and unmistakably related to his objective of evading income taxes. Accordingly, the offenses for which petitioner is now sought to be prosecuted are based upon the same criminal transaction for which he was previously prosecuted and come within the provisions of CPL 40.20 (2).

Respondents argue, alternatively, that the proscriptions of CPL 40.20 (2) are not applicable because of the exception contained in CPL 40.20 (2) (b), which excludes the statutory bar to a second prosecution where the subsequent offenses charged contain elements which are not elements of the previously charged offense and the different kinds of harm. We start with the proposition that all of the offenses charged in the Albany County indictment contain elements which are not elements of the offenses charged in the New York County indictment. The pivotal question then is whether the statutory provisions of the Albany County offenses are designed to prevent very different kinds of harm than the harm designed to be

prevented by the offenses charged in New York County.

Our first inquiry, therefore, is whether the harm to be prevented by the Penal law crime of offering a false instrument for filing is very different from that sought to be prevented by the Penal law crime of scheme to defraud. We believe it is. Case law, the commentaries and the legislative annotations instruct that the scheme to defraud statute is a consumer protection measure whose purpose is to prevent multiple victims from being bilked of small amounts of money by way of fraudulent scams or schemes (see, People v. Mikuszewski, 73 NY2d 407, 412-413; Donnino, Practice Commentary, Mckinney's Cons Laws of NY, Book 39, Penal Law § 190.60, at 423-425; Sponsor's Mem, 1976 NY Legis Ann, at 35-36). Offering a

false instrument for filing, on the other hand, was enacted to prevent persons from defrauding the State out of substantial sums of money or to frustrate the State's power to fulfill its responsibility to carry out its own law (Donnino, Practice Commentary, McKinney's Cons Laws of NY, Book 39, Penal Law § 175.30, at 336). Likewise, the harm sought to be prevented by the Penal Law crime of falsifying business records is very different from that concerning offering a false instrument for filing. The former is intended to prevent a business entity from being defrauded by means of false entries in its books or records (cf., People v. Brown, 140 App Div 591, appeal dismissed 202 NY 585.) So while it is arguably possible to bring the State within the reach of the crimes charged in the New

York County indictment, the fact remains that the harm the Legislature intended to prevent by those crimes in entirely different from that sought to be prevented by the crime charged in the first count of the Albany County indictment.

The same can be even more persuasively said of the second and third counts of the Albany County indictment. The harm sought to be prevented by the statutes alleged to have been violated in those two counts is the privation of moneys due the State for the orderly operation of government as opposed to the deceitful theft of property from consumers or the defrauding of a business entity falsification of its records. Put another way, were we to ask the legislators who drafted Penal law §§

175.05 and 190.65 whether they intended thereby to prevent tax evasion, what would their answer be? To ask the question is to answer it. Neither a statute was enacted to prevent tax evasion Accordingly, petitioner's application is in all respects denied.

Mikoll, J.P. Yesawich Jr., Mercure and Harvey, JJ., concur.

ADJUDGED that the petition is dismissed, without costs.

ENTER:

Michael J. Novack
Clerk

STATE OF NEW YORK
COUNTY COURT COUNTY OF ALBANY

THE PEOPLE OF THE STATE OF NEW YORK

-against-

ALFRED C. SHARPTON,

Defendant.

APPEARANCES: OF COUNSEL:

For the People:
HON. ROBERT ABRAMS — VICTOR
Attorney General — GENECIN, ESQ.
State of New York — Assistant
Department of Law — Attorney
120 Broadway — General
New York, NY 10271

For the Defendant:
Michael A. Hardy, Esq. and
Harry Kresky, Esq.
The International Peoples' Law Institution
250 West 57th Street
New York, NY 10019

TURNER, J. This is a motion by the defendant for an order dismissing the indictment upon the ground that further prosecution of the defendant would violate the double jeopardy clause of the Fifth Amendment of the United

States Constitution as well as Article 40 of the Criminal Procedure Law. For the reasons as hereinafter set forth, the defendant's motion is denied in all respects.

The defendant was indicted in New York County for four counts of Scheme to Defraud in the First Degree in violation of Penal Law Section 190.65(1)(a), one count of Scheme to Defraud in the First Degree in violation of Penal Law Section 190.65(1)(b), two counts of Falsifying Business Records in the First Degree in violation of Penal Law Section 170.05(1) and sixty counts of Grand Larceny in violation of Article 155 of the Penal law. The defendant was also indicted in Albany County for one count of Offering a False Instrument for Filing in the First Degree in violation of Penal Law Section 175.35, one count of Filing a

False or Fraudulent Tax Return in violation of Tax Law Section 1804(b) and one count of Failure to File a Return or Report in violation of Tax Law Section 1801(a). The defendant was tried in New York County on the sixty-seven count indictment and found not guilty of all counts. The defendant's Albany County case has been set for a day certain of April 1, 1991. The instant motion ensued.

The defendant's argument under C.P.L. Article 40 is non-persuasive. Criminal Procedure Law Section 40.20 states, in pertinent part, "A person may not be twice prosecuted for the same offense...A person may not be prosecuted for two offenses based upon the same act or criminal transaction..." C.P.L. Section 40.20(1), (2). Several exceptions are provided to the rule of

law. The facts of the case at bar fit squarely into the exceptions listed in subdivisions (a), (b) and 9c). Accordingly, the defendant's motion in respect of C.P.L. Section 40.20 is denied in all respects.

The defendant's next contention is that his rights under the Fifth Amendment of the United States Constitution will be violated by the prosecution of the Albany County indictment.

The double jeopardy clause of the Fifth Amendment of the United States Constitution provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Constitution, Fifth Amendment. The protection against double jeopardy has been embodied in two decisions from the United States Supreme

Court, U.S. v. Blockburger, 284 U.S. 299 (1932) and Grady v. Corbin, 110 S. Ct. 1084 (1990).

The court in Blockburger held that in order to determine whether the offense charged in the subsequent prosecution is violative of the double jeopardy clause of the United States Constitution, the court must determine if the subsequent prosecution "...requires proof of a fact which the other does not." Blockburger at 304. In the case at bar, the elements of the crimes charged in the Albany County indictment are separate and distinct from one another. Accordingly, the defendant's claim fails under the Blockburger test. Our inquiry, however, does not end here.

The United States Supreme Court in Grady v. Corbin sets forth a "conduct

test." Grady at 2093. Unlike the Blockburger test which is solely concerned with the elements of the offenses charged, the Grady test focuses on the conduct of the defendant. Under Grady a second prosecution violates the double jeopardy clause of the Fifth Amendment if it encompasses the same conduct, act or mental state involved in the first prosecution. In applying the Grady rule to the case at bar, the court finds that the conduct of the defendant as charged in the New York County indictment is separate and distinct from the conduct charged in the Albany County indictment. In New York County the conduct of the defendant alleged in the indictment and at trial was that: (1) the defendant engaged in a scheme to defraud people, (2) that the defendant falsified business records concerning

two concert promotions, and (3) that the defendant stole various amounts of money from different people. In Albany County the conduct of the defendant as alleged in the indictment consists of the following acts: (1) knowingly offering a false instrument for filing with the intent to defraud the State, (2) filing a false or fraudulent tax return which substantially understates his tax liability and (3) failure to file a tax return. Thus, the conduct encompassed in the Albany County indictment concerns the defendant's acts involving his taxes while in New York County the defendant's conduct does not involve his tax liability. Accordingly, the defendant's case fails under Grady v. Corbin, supra. Thus, the court finds no merit to the defendant's contention that the prosecution of the Albany County

indictment would violate his rights under the double jeopardy clause of the Fifth Amendment of the United States Constitution.

Notwithstanding the court's denial of the defendant's motion in respect of double jeopardy, the court is compelled to examine the issue of collateral estoppel. The doctrine of collateral estoppel precludes the People "...from relitigating an issue of fact once the issue has been resolved in the defendant's favor in a prior proceeding between the same parties." U.S. v. Jacobson, 547 F. 2d 21, 23 (1976). See also Ashe v. Swenson, 90 S.Ct. 1189 (1970). Collateral estoppel applies solely to questions of fact that were necessarily resolved by the jury in reaching its verdict. As the court in U.S. v. Jacobson has held, " The

defendant must demonstrate that the prior jury could not reasonably have grounded its verdict upon an issue other than that which he now seeks to foreclose from consideration." U.S. v. Jacobson at 23. See also Dowling v. U.S., 110 S. Ct. 668 (1990). In the instant case, the defendant has failed to carry his burden.

Nonetheless, the court has examined the record of the prior proceeding, the evidence and of the relevant documents. After so doing, the court is of the opinion that a rational jury could have grounded its verdict on an issue other than that which the defendant seeks to foreclose from consideration. Thus, the verdict at the first trial does not establish the non-existence of the money for purposes of collateral estoppel at

the trial to be commenced in Albany County.

In conclusion, the defendant's motion is denied in all respects.

This shall constitute the decision and order of this court.

Dated: Albany, New York
March 7, 1991

/s/ John G. Turner, Jr.
Albany County Judge

SUPREME COURT OF THE STATE
OF NEW YORK
COUNTY OF NEW YORK

(Excerpted)

THE PEOPLE OF THE STATE OF NEW YORK	
-against-	INDICTMENT No. 6761/89
ALFRED C. SHARPTON,	BILL OF PARTICULARS PURUSANT TO ORDER DATED OCT. 16, 1989
Defendant.	

To: ALFRED C. SHARPTON, Defendant
c/o Alton H. Maddox, Jr., Esq.
Attorney for Defendant

S I R :

The following particulars are provided in compliance with the Court's Order of October 16, 1989. The system of numbering herein is that untilized by the Court. This Bill supplements, but does not replace, the Bill served on you on August 21, 1989. With respect to items (4) and (5) in all sections, pertaining to accomplices, no

accomplices are known by the People to exist.

1. Section A: Counts One Through Five

Items (1), (3), (7), (8), (9), (11) and (12)

FIRST COUNT

From at least the year 1980, and at all times throughout the period specificied in this count (and, therefore, during the periods indicated for the SECOND through FIFTH counts), defendant persistently and continually identifies himself as "President" or "National Chairman" of something that he called "National Youth Movement,Inc." (NYM). In television and radio appearances, in newspaper interviews, in conversation and in correspondence, defendant represented NYM to be a charitable organization with many different programs devoted to improving the

condition of minority young people. Defendant solicited and received contributions to NYM, but did not spend the money in the ways in which he told the contributors that he would. On those occasions when he solicited contributions without specific representations as to their use, he did not spend the money in a manner consistent with his descriptions of the organization. Indeed, any given contribution is viewed by the People as the result of both an immediate solicitation and of the cumulative effect of defendants's pretenses. Defendant further used the bank accounts of National Youth Movement, Inc. to conceal from the state tax authorities personal income that he earned form his business activities in the field of entertainment and music promotion.

Because defendant was continually engaged in promoting his scheme to defraud, it is impossible to specify each of the dates and times at which acts in furtherance of his ongoing scheme were committed. The FIRST count, however, embraces the time period and acts of the SECOND through FIFTH counts, and all of the dates given below with respect to those counts, as well as all descriptions of defendant's conduct, apply to the FIRST count as well.

In addition, the FIRST count embraces the following acts not included within the second through fifth counts.

i. On or about August 20, 1981, defendant opened a savings account at Carver Federal Savings Bank in the name of NYM which remained active until March 4, 1985. Defendant was the sole

signatory on this account, and withdrew cash from it.

ii. On or about June 9, 1982, defendant opened a checking account no. 106-2220 at Freedom National Bank of New York in the name of NYM. Throughout the period named in the first count, defendant used this account to negotiate checks drawn by contributors to NYM. The bulk of these contributions was withdrawn by defendant from this account in the form of cash. Defendant was at all times the sole signatory on this account. Defendant also cause payments owed to him for his business dealing to be directed to this account.

iii. On an unknown dated prior to January 1, 1985, defendant obtained free office space within St. Mary's Hospital, Brooklyn, New York upon the representation that NYM was a community

organization. From this space, defendant conducted certain of the business of NYM, as well as his personal business activities. He used the hospital's address on correspondence and to receive certain contributions.

iv. Defendant maintained a telephone at the St. Mary's Hospital office in the name of NYM throughout most of the period specified in the first count.

v. On two occasions, (exact date unknown) defendant devised letterheads for NYM. The first occasion was sometime prior to January, 1985, and the second was after February, 1986. These letterheads both bore the name "National Youth Movement, Inc." although NYM was not incorporated under the Not-For-Profit Corporation Law or any other statute. Both letterheads were used by

defendant for various correspondence, including letters soliciting contributions. The letterheads implicitly made the false number of divisions, and officers drawn from the ranks of business, government service and the clergy.

vi. On or about April 8, 1985, defendant sent a solicitation letter on NYM letterhead to Freedom National Bank seeking a contribution to purchase an advertisement in an NYM "journal aimed at dissuading students from engaging in criminal activities." The Bank contributed $150 in support of this magazine on April 17, 1985, as did Norby Walters Associates on May 22, 1985. The journal was never published.

vii. On or about September 5, 1985, defendant wrote to CBS Records on NYM letterhead. In the letter, defendant

falsely represented that he and NYM were raising a disinterested challenge to the manner in which record companies engaged independent promoters for records by black artists. Defendant made the same representations in telegrams dated August 23 and September 3, 1985 addressed to RCA Records. In fact, defendant was seeking business for himself as an independent record promoter.

viii. On or about January 6, 1987, defendant sent solicitation letters on NYM letterhead to RCA Records, Elektra Records (a part of Warner Communications) and Polygram Records, requesting contributions to an event he called the "International Luncheon on World Racism." Elektra issued a check to NYM for $2,000 on January 15, 1987 for $2,000 which

defendant deposited on January 23, 1987. This money was not used to pay the costs of the luncheon, as represented in the solicitation letter.

ix. On or about February 9, 1987, defendant sent a solicitation letter on NYM letterhead to Bendiner & Schlessinger, Inc., of New York, New York, including the false representation that contributions to NYM were tax deductible. As a result of this solicitation, defendant received a check to NYM for $1000 on or about February 28, 1987, which he deposited in NYM's bank account on or about March 2, 1987. At the same time, defendant withdrew $925 in cash from the NYM account.

x. On or about November 8, 198, defendant sent a solicitation letter on NYM letterhead to Warner Communications, Inc. including the false representation

that the contribution he was seeking would be a part of a Christmas Fund to be used to give gifts to poor children. Defendant followed this letter with telephone calls to executives of the company. As a result of this effort, defendant received a check to NYM in the amount of $1,500 on or about January 8, 1988 which he deposited on that dated in the account of NYM; at the same time, defendant withdrew $1400 in cash from the account. There was no program to give gifts to poor children.

xi. At some time prior to March 1984, defendant induced RCA Records to place NYM's name on the contribution list of RCA Corporation, which gave $2,500 to NYM on March 9, 1984. A contribution in the same amount was given by RCA Corporation the following year, on March, 1985.

xii. From on or about December 2, 1983, defendant induced Don King Foundation, Inc. to contribute to NYM. Defendant continued to obtain contributions from this source throughout the period specified in the first count. Among the means defendant used to secure contributions was a solicitation letter for the 1986 Unity Awards Dinner (see THIRD count infra), dated January 6, 1986, in which defendant indicated that Don King, President of Don King Foundation, Inc. would be Man of the Year at the dinner along with the President of CBS Records. Defendant also gave Mr.King an award he called "First Annual Crackbuster of the Year Award" at the WAR on Crack Celebrity Dinner, held on September 23, 1986 (see FOURTH count infra). Defendant further wrote letters on

behalf of certain interests of Mr. King's on NYM letterhead, on November 14, 1986 and February 18, 1987. The contributions made by Don King Foundation, Inc. are part of the property obtained by defendant under the first count, and they are also the subject of separate charges of grand larceny under the EIGHT through FOURTEENTH counts inclusive. The relevant dates and specific amounts are provided below under the EIGHTH through FOURTEENTH counts.

xiii.On or about December 18, 1986, defendant requested a meeting with the Charities Bureau of the Attorney General's office, which took place on February 25, 1987. At this meeting, defendant made false representations concerning the operations of NYM, as detailed in the People's Notice pursuant

to C.P.L. § 710.30 dated July 6, 1987. Defendant further filed a false Annual Report of Charitable Organization, in December, 1987. This Annual Report was also provided to defendant as part of the People's Notice pursuant to C.P.L. § 710.30.

With respect to the "ten or more persons" whom defendant intended to defraud under the FIRST count, included are all the person named in connection with the SECOND through FIFTH counts. In addition, his intent to defraud under the FIRST count also include the following persons not named in the subsequent counts. Where an amount of money is listed next to the name, this amount describes the property, i.e., the sum of money, known to have been obtained by defendant a result of his scheme.

DON KING FOUNDATION, INC.	approx.	$44,500
BENDINER & SCHLESINGER, INC.	approx.	1,000
NEW YORK CITY		
NEW YORK STATE		
RCA CORPORATION	approx.	2,500
KENNETH J. ROBERTS	approx.	5,500

The following persons made contributions that are part of one or more of the SECOND through FIFTH counts, but also gave additional amounts that are separately included within the FIRST count. The amounts of money listed here next to their names are those amounts obtained by defendant under the FIRST count, but not also obtained under any of the SECOND through FIFTH counts.

POLYGRAM RECORDS, INC.	2,500
WARNER COMMUNICATIONS, INC.	2,000
FREEDOM NATIONAL	

BANK	150
NORBY WALTERS ASSOCIATES	150

SECOND COUNT

The second count charges defendant with the crime of Scheme to Defraud in the First Degree in violation of p.l. § 190.65(1)(a) in connection with a fundraising event that defendant called the "1985 Unity Awards Dinner," a banquet held at the Waldorf-Astoria Hotel in New York City on February 13, 1985. Defendant solicited contributions to this event by means of letters on NYM letterhead, as described above, dated January 22, 1985. In these letters, defendant falsely represented that NYM had "youth motivation and employment programs" which the contributors' money would be used to support. The letters also claimed that

an award for "Video of the Year" would be presented, based upon a "high school student vote." The invitation card, enclosed with the solicitation letter, stated that the video award would be given to Pia Zadora and Jermaine Jackson. Not only had there been no high school vote to determine this award, but defendant was, at the time of this letter, a party to a commercial contract to promote the record made by these artists.

By means of this fundraising scheme, defendant defrauded the persons listed below. Where an approximate amount of money is listed next to the name, this amount describes the property, i.e. the sum of money, know to have been obtained by defendant as a result of his scheme.

INTERNATIONAL CREATIVE MANAGEMENT, INC.	$1,750

CBS RECORDS, INC.	1,750
ARISTA RECORDS, INC.	1,750
RCA RECORDS	4,000
CARVER FEDERAL SAVINGS AND LOAN ASSOCIATION	175
PEPSICO, INC.	3,500
POLYGRAM RECORDS, INC.	2,000
BUTCH LEWIS PRODUCTIONS	500
NORBY WALTERS ASSOCIATES, INC.	1,750
MCA, INC.	1,750

THIRD COUNT

The third count charges defendant with the crime of Scheme to Defraud in the First Degree, in violation of penal law § 190.65(1)(a), in connection with a fundraising event that defendant called the 1986 Unity Awards Dinner, a banquet held at the Waldorf Astoria Hotel in New York City on February 11, 1986. Defendant solicited contributions to this event by means of letters on NYM

letterhead, as described above, which were undated. In these letters, defendant falsely represented that the persons to be honored at the dinner had been selected by a voting committee from 12 states, and that the honorees had been selected because they had "done the most that year to advance social harmony and economic equity."

By means of this fundraising scheme, defendant intended to defraud the person listed below. Where an approximate amount of money is listed next to the name, this amount describes the property, i.e. the sum of money, know to have been obtained by defendant as a result of his scheme.

INTERNATIONAL CREATIVE MANAGEMENT	$2,000
CBS, INC.	2,000
RCA RECORDS	2,000

MCA, INC	2,000
PACE CONCERTS	2,000
THE COCA-COLA COMPANY	2,000
POLYGRAM RECORDS, INC	2,000
CAPITAL RECORDS	2,000
BUTCH LEWIS PRODUCTIONS	200
A.M.I., INC.	
W.G. GARRISON	5,000

FOURTH COUNT

The fourth count charges defendant with Scheme to Defraud in the First Degree in connection with a fundraising event that defendant called the "War on Crack Celebrity Dinner," a banquet held at the Plaza Hotel in New York City on September 23, 1986. Defendant obtained contributions to this event by means of a solicitation package, which included a letter on NYM letterhead, as described above, other writings by defendant

discussing achievements and programs of NYM, and news clippings about defendant.

Among the false representations in this undated solicitation package were the following:

- that NYM had produced, and would continue to produce, radio and TV specials and commercials to educate young people about drugs;
- that NYM had held celebrity speaking tours of high schools to educated young people about drugs;
- that half the funds raised by the dinner would be given to Day Top Village, Inc.;
- that NYM had chapters in 16 cities and over 30,000 members;
- that NYM had established "over 15,000 new youth jobs in the private sector;"
- that defendant had instituted community projects in 20 cities during the "Victory" tour of the Jacksons in 1984;
- that NYM had registered "literally thousands of new voters";

- that NYM had created an intern program at a major record company that had placed minority youth in executive offices around the county every summer since 1983;

- that NYM had secured agreements from two major record companies insuring that the majority of these companies budgets for the promotion of black music would be spent with black entrepreneurs;

- that NYM had formed a "Concert Promotions arm," to enable black artists to work with black promoters and perform community services.

At the War on Crack Celebrity Dinner, defendant stated falsely to the guests that he was giving $8,000 to Day Top Village at that moment.

By means of this fundraising scheme, defendant intended to defraud the persons listed below. Where an approximate amount of money is listed next to the name, this amount describes the property, i.e. sum of money, known

to have been obtained by defendant as a result of his scheme.

INTERNATIONAL CREATIVE MANAGEMENT	$3,000
CBS, INC.	3,600
LASTFOGEL FOUNDATION	3,000
MILLER BREWING COMPANY	3,000
RCA RECORDS	3,000
ASSOCIATED BOOKING CORPORATION	600
DYNAMIC DUO	6,000
FREEDOM NATIONAL BANK	600
STAGERIGHT PRODUCTIONS	600
GAINES SERVICE LEASING CORPORATION	3,000
MCA RECORDS	1,500
PACE CONCERTS	750
WARNER COMMUNICATIONS, INC.	7,500
A & M RECORDS	1,200
THE COCA COLA COMPANY	3,000
SPANISH INTERNATIONAL TV NETWORK	3,000
T.R.I.A.D. ARTISTS, INC.	1,500
WCBS-TV	600

MONARCH BOXING	3,000
SUTRA RECORDS	1,200
POLYGRAM RECORDS, INC.	3,000
CAPITOL INDUSTRIES - EMI, INC.	6,000
NORBY WALTERS ASSOCIATES, INC.	1,500
ALIVE ENTERPRISES, INC.	600
PAUL BUCHA & COMPANY, INC.	600
MILTON FINE AND EDWARD A. PERLOW	600
SHELLY FINKEL MANAGEMENT	600
FISHER BROTHERS FOUNDATION	1,000
FRANK S. FOLK, M.D.	600
ISLAND RECORDS	600
K.L. MANAGEMENT, INC.	750
MGM/UA/HOME VIDEO	500
MIC-RON GENERAL CONTRACTORS, INC.	300
MITCHELL, TITUS & COMPANY	300
M.T.V. NETWORKS	600
KENNETH J. ROBERTS	3,000
SCHIEFFELIN & COMPANY	600

JOSEPH R. STARITA	600
VOLPE TOURS, INC.	900
WABC-TV	600

FIFTH COUNT

The fifth count charges defendant with the crime of Scheme to Defraud in the First Degree in violation of P.L. § 190.65(1)(b) in connection with his solicitation of contributions to finance an anti-drug magazine to be called Think! This solicitation was carried out by means of undated letters on the letterhead of NYM, as described above. These letters falsely represented:

- that NYM would print an anti-drug magazine to be distributed in schools and churches;
- that NYM had held "high school and concert tours with major artists preaching the anti-drug message;"
- that NYM "leaders [had] appear[ed] at countless forums, and T.V./radio programs;"

- that the Think! magazine would be distributed free during the summer to thousands of youths;

- that NYM would conduct a 20-city tour with the participation of stars and public figures impacting high school, college campuses, churches, and community groups, and that NYM would give away more than 200,000 free copies of Think! on this tour.

Enclosed with the solicitation, defendant sent a document, also on NYM letterhead, headed "Advertising Sheet;" This sheet listed prices for advertising in the Think! magazine.

In addition to solicitation letters, defendant made telephone calls, and caused telephone calls to be made, to encourage potential contributors to purchase "advertising space" in Think! magazine. The magazine was never published.

By means of this fundraising scheme, defendant intended to defraud the persons listed below. Where an approximate amount of money is listed next to the name this amount describes the property, i.e., the sum of money, know to have been obtained by defendant as a result of his scheme.

WARNER COMMUNICATIONS	$2,250
MILLER BREWING COMPANY	3,000
DONALD J. TRUMP	2,250
MCA, INC.	2,250
POLYGRAM RECORDS, INC.	3,000
CAPITOL RECORDS	2,250

2. Section B: Counts Six and Seven

Items B. (1) and (3), (7), (8), (9), (11) and (13)

SIXTH COUNT

The falsification of business records occurred on July 19, 1986 at Madison Square Garden, new York City, in

a room backstage used by concert promoters. The exact time at which defendant committed this crime is unknown, except that it was in the evening, prior to the settlement of the concert given by the group Run DMC.

Defendant arranged for the promoter of the concert in question to pay him $5,000, which he received in cash. Defendant caused the promoters to draw up a receipt that showed this money going to NYM. Defendant personally signed this receipt. By this conduct, defendant sought to commit or conceal the crime of scheme to defraud charged in the first count, as well as violation of Tax law 1801(a).

SEVENTH COUNT

The falsification of business records occurred on July 19, 1986 at Madison Square Garden, New York City, in

a rom backstage used by concert promoters. The exact time at which defendant committed this crime is unkown, except that it was in the evening, prior to the settlement of the concert given by the group Run DMC.

Defendant arranged for the promoter of the concert in question to pay him $5,000, which he received in cash. Defendant caused the promoters to draw up a receipt that showed this money going to NYM. Defendant personally signed this receipt. By this conduct, defendant sought to commit or conceal the crime of scheme to defraud charged in the first count, as well as violation of Tax Law § 1801(a). 3037.Sections C - KK:

Counts Eight Through Sixty-Seven

Items (1), (2), (7), (9) and (10)

All of these counts charge larcenies from contributors to NYM by means of the schemes to defraud charges in the first through fifth counts. Defendant, over weeks, months, or years, induced in these contributors the misapprehension that NYM was a genuine charitable organization.

Listed below, for each count, are the approximate date or dates, where known, of individual solicitations, descriptions of solicitations, referencing the appropriate count of scheme to defraud; the approximate dates on which the contributions were made; the amounts of money involved; and the form of payment.

SUPREME COURT OF
THE STATE OF NEW YORK
COUNTY OF ALBANY

x

THE PEOPLE OF
THE STATE OF NEW YORK

-against- INDICTMENT

ALFRED C. SHARPTON,

Defendant.

x

FIRST COUNT

THE GRAND JURY OF THE ALBANY COUNTY SUPREME COURT, by this indictment, accuses the defendant of the crime of OFFERING A FALSE INSTRUMENT FOR FILING IN THE FIRST DEGREE, in violation of Penal Law § 175.35, committed as follows:

On or about August 15, 1988, in the County of Albany, knowing that a written instrument, namely a New York State Resident Income Tax Return (Form IT-201 and attachments) for tax year 1987 for Alfred C. Sharpton, contained a false

statement or false information, and with intent to defraud the state or political subdivision thereof, the defendant offered or presented it to a public office or public servant, the New York State Department of Taxation and Finance, with the knowledge or belief that it would be filed with, registered or recorded in or otherwise become a part of the records of such public office or public servant. A copy of this written instrument is attached to this indictment.

SECOND COUNT

THE GRAND JURY OF THE ALBANY COUNTY SUPREME COURT, by this indictment, accuses the defendant of the crime of FILING A FALSE OR FRAUDULENT RETURN in violation of Tax Law § 1804(b), committed as follows:

On or about August 15, 1988 in the County of Albany, the defendant filed a false or fraudulent return, namely a New York State Resident Income Tax Return (Form IT 201 and attachments) for tax year 1987 for Alfred C. Sharpton, with intent to evade a tax imposed by Article 22 of the Tax law or a related income or earnings tax statute, and with such intent, substantially understated on such return his tax liability under such article or such statute. A copy of this return is attached to this indictment.

THIRD COUNT

THE GRAND JURY OF THE ALBANY COUNTY SUPREME COURT, by this indictment, accuses the defendant of the crime of FAILURE TO FILE A RETURN OR REPORT in violation of Tax law § 1801(a), committed as follows:

On or about April 15, 1987 in the County of Albany, the defendant, with intent to evade a tax imposed under Article 22 of the Tax law or a related income or earnings tax statue, or any requirement thereof, or any lawful requirement of the tax commission thereunder, failed to make render, sign, certify or file any return in the name of Alfred C. Sharpton or supply any information within the time required by the provisions of Article 22 of the Tax law or any such statute for tax year 1986.

ROBERT ABRAMS
Attorney General for the
State of New York

EXCERPT FROM PROSECUTION OPENING AT N.Y. COUNTY TRIAL

Openings - Mr. Genecin

During this trial, ladies and gentlemen of the jury, you are going to hear testimony about thousands of dollars, thousands and thousands of dollars that people paid to Reverend Al Sharpton in checks made out to the National Youth Movement, but that weren't contributions to the organization.

You will hear about the money that was contributions and you will hear about money made out to the National Youth Movement that wasn't contributions.

You will also hear about thousands more in cash payments to Reverend Al

Sharpton that were also not contributions to the National Youth Movement, for which he gave receipts and which he wrote he was taking the money on behalf of the National Youth Movement.

All of this money was money he obtained from business dealings but he took it in the name of the National Youth Movement in order to evade paying taxes.

So we are going to prove to you that Al Sharpton's National Youth Movement had three real purposes: One, to get money from charitable donors by means of lies and misrepresentations. Two, to promote and enhance Al Sharpton's position and earnings from the popular music field. And three, to enable Al Sharpton to hide his earnings from the tax authorities. In short,

ladies and gentlemen, a scheme to defraud.

That is our case in a nutshell.

(T. 41-42)*

EXCERPT FROM TRANSCRIPT OF N.Y. COUNTY TRIAL

Colloquy

MR. GENECIN: What we have here is large amounts of money that were received by the defendant through Western Union. There are a number of transfers. There may be --

THE COURT: I'm sorry, I'm not hearing that. The last thing I heard was large amounts of money received by the defendant.

MR. GENECIN: Through Western Union.

THE COURT: Yes?

---

* "T" stands for Trial Transcript. Page number follows.

MR. GENECIN: And the persons who sent this money include William Garrison, who was the defendant's partner in Hitbound, Incorporated, as well as other individuals who are connected to the defendant through his concert business activities.

Now, it is true that on the face of the particular documents, what you have is the name of a human being who is the sender and the name of Reverend Al Sharpton as the receiver of the money.

THE COURT: Correct.

MR. GENECIN: And to the extent that it's your Honor's position that a further connection needs to be made, I will say that we expect to have testimony with respect to just about every single one of these documents concerning the money that was transferred to Reverend Sharpton and

just exactly what the origin of that money was, and who that money was supposed to be for and what that was about.

THE COURT: And it relates to the charges in the indictment?

MR. GENECIN: Oh, yes, clearly.

(T. 3423-3424)

* * * * * * *

Colloquy

THE COURT: Mr. Maddox.

MR. MADDOX: Yes, Judge. The first document that I object to -- first of all let me just say something before I make the specific objection.

Judge, I would like to point out this particular prosecution is not one that involves based on the indictment the Federal, State or local tax returns and that the reading of the indictment or any fair expansion of the indictment

does not in any way incorporate this as a subject area of prosecution here.

So with respect to the 1040 form and the accompanying documents as well as the 4860 application for extension and the notes with respect to the Federal Return as well as the New York City form 202EZ which is the unincorporated business tax return for individuals, also for the year 87, as well as the resident New York State tax return from IT--201.

Similarly for the year seventy-seven, Federal return for the year seventy-seven I first object to these documents as having no relevance at all to this prosecution and obviously only been offered to create a certain amount of prejudice with respect to my client.

THE COURT: Alright, I will hear from the People on that issue.

MR. SASLAW: First of all specifically both in Mr. Genecin's opening statement and certainly in the bill of particulars was mentioned one of the objectives of the scheme to defraud charge count one of the indictment was to conceal income from tax authorities and it has been clear from the outset that has been part of the People's proof on this case and specifically mentioned in the opening. We intend to mention it in summation.

One of the three areas we focused on and here you have a witness who was retained to assist Reverend Sharpton to file his returns, asked specific questions as to Reverend Sharpton's income and was given incomplete information based on the evident that has been received so far which I submit

illustrates the point that we are trying to make.

(T. 6611-6613)

EXCERT FROM TESTIMONY OF L. SHEPHERD

Sheppard - Direct - People

A No, sir.

Q He didn't give you any bank statements?

A No, sir.

Q He didn't give you any K1's that you mentioned?

A No, sir.

Q He didn't give you any receipts?

A No, sir.

Q He didn't give you any cancelled checks?

A No, sir.

Q Did you ask him whether he had any bank accounts?

A In the initial meeting, yes.

Q And what did he say?

A Well, he said he didn't have any.

Q He said he had no bank accounts?

A Yes.

Q Did you ask him whether he had any 1099's?

A Yes.

Q And what did he say to you?

A He said he didn't have any 1099's.

Q And so you say he did bring some documents. What was that document?

A Well, he brought a list of the income that he made during that year. Which was basically a listing of dates, who paid him, and the amounts.

Q Was a listing of dates?

A Dates, who he got paid from and the amounts.

Q And did he give you any information from those notes? From those -- did he tell you anything based on the notes that he had in front of him?

A I am not sure I understand the question.

Q Well, did he give you any information during this conversation?

A Well, just that he made x amount of dollars from this source and that source .

Q Well, tell us that. What did he tell you? Do you recall what he said as to the sources of his income?

A Well, they were written down. And they comprised basically three sources. Which is about $14,00 from work with Don King. And 45,500 from

work with an organization called Hitbound.

Another thousand from some consulting work he did with Mr. James Brown. And another $1,500 that was for speaking engagements.

Q And did you make any notes of any of the information that he gave you?

A Yes.

Q Did you write any of that down?

A I took a copy of that and I made notes in terms of the figures he had listed.

The figures were in chronological order in terms of dates. So I had to go through and add them up and differentiates how much he made from this and how much he made from that source.

Q Let me show you a document that has been previously marked as People's exhibit 283 for identification. Do you recognize that?

A Yes, sir.

Q What is it?

A This is a summary of his income and expenses which I took from the information he gave me.

Q And this is in your handwriting?

A Yes, sir.

Q And this is based on the information that Reverend Sharpton gave to you?

A Yes, sir.

Q By the way, when Reverend Sharpton indicated to you that he had no 1099's, what, if anything, did you tell him about the income that he

(GAP IN TEXT)

Q Does schedule C require a report of the gross receipts or sales of the taxpayer's business or professional activity?

A Yes, sir.

Q And you told us that was approximately twenty thousand five hundred fifty dollars?

A Yes, sir.

Q And he told you the source of that --

MR. MADDOX: The total

THE COURT: What did you say was the total that you put on the schedule C from concert promotions?

A I think twenty thousand five hundred.

THE COURT: Twenty thousand five hundred?

A Yes.

MR. MADDOX: That wasn't just from concert promotions he said consultant.

THE COURT: Concert promotions, consultant?

A That's correct.

THE COURT: That is separate and apart from speaking engagements?

A That's correct.

THE COURT: You did not include those on the schedule C?

A I did not.

Q Let me show you a document previously marked for identification as People's Exhibit 282 for identification. page three of six.

(witness perusing)

Q And I ask you if you recognize that, sir?

A I do, sir.

Q Is that your handwriting?

A Yes, sir.

Q Does that refresh your recollection as to the amount of money that Reverend Sharpton that you entered on the schedule C as the total amount of the gross receipts from the operation of Reverend Sharpton's business?

A Yes.

Q What is that amount?

A Twenty thousand five fifty.

Q And it was that -- where did you get that amount from?

A From the information he brought in the second meeting.

Q And in that information that he gave you did he breakdown the sources of that twenty thousand five hundred fifty dollars?

A Yes.

Q And can you tell us how he broke that money down?

A Work with James Brown a thousand.

THE COURT: I am sorry work with James Brown was what?

A One thousand. I think fifty-five hundred Hitbound and the balance of fourteen thousand or fourteen five was Don King.

Q Now you mentioned a company called Hitbound. Did Reverend Sharpton tell you whether this was -- first of all, as to all of these amounts fourteen thousand from Don King fifty-five hundred from Hitbound?

THE COURT: Fourteen thousand five hundred.

Q I am sorry?

A Either fourteen or fourteen five.

Q Do you have a piece of paper up there that would refresh your recollection?

A Fourteen thousand. Fourteen thousand. I am sorry.

Q Fourteen thousand from Don King, fifty-five hundred from Hitbound and a thousand from James Brown?

A Yes.

Q Now, all three of these amounts did Reverend Sharpton indicated to you whether those were approximations or exact amounts?

A These were exact amounts.

Q You asked him?

A Well he had dates, gave me a list of the dates, the payee and the amount I can.

Q All right did --what if anything did Reverend Sharpton tell you about Hitbound?

A Nothing other than he got paid fifty-five hundred.

Q Did he tell you what he did to get paid that money from Hitbound?

A No, sir he didn't.

Q Did he tell you anything about the ownership of Hitbound?

A No, sir.

Q Did Reverend Sharpton tell you he owned any part of Hitbound?

A No, sir.

Q If Reverend Sharpton had told you that he owned --

MR. MADDOX: Objection if.

THE COURT: Overruled.

Q If Reverend Sharpton told you he owned any part of Hitbound what if anything would that have done with respect to your taxpayer, your preparing tax returns for him?

A I want to know if it is the corporation or a partnership.

Q Why is that?

A If it is a partnership either make money or lose money which would bear on his tax return.

Q And if it is a corporation I would want to know if it was escrow, we mentioned earlier distributed escrow is taxed as a partnership. I want to know if any losses or gains attributable to that entity should be reflected on his tax return.

Q Did he tell you anything at all about how he came to earn or obtain fifty-five hundred dollars from Hitbound?

A No, sir.

Q Now with regard to the fourteen thousand dollars that Reverend Sharpton told you he obtained from Don

King. Did he tell you whether this was a precise figure or an approximation?

A Precise figure.

Q This was also on that list with specific dates?

A Yes, sir.

Q Reverend Sharpton tell you what he did for Don King to receive this fourteen thousand dollars?

A This would be concert promotion.

Q And with regard to the one thousand dollars from James Brown what if anything did he tell you about how he came to earn the on thousand dollars from James Brown?

A Consulting on the James Brown issue.

(T. 6567-6569, 6575-6580)

EXCERPT FROM TRIAL TESTIMONY
OF R. DOUGLAS

Douglas - Direct - People

Q Now, in the course of Freedom National Bank responding to the subpoena that my office served on you, was a search made of the records of the bank in order to find all of the transactions on the three accounts that you have described on which Reverend Al Sharpton was a signatory?

A Yes.

Q Was a search made also to recover the opening document on those accounts?

A Yes.

Q Was a search made also to recover the opening document on those accounts?

A Yes.

Q And that would include both the application form and the signature cards on those accounts is that right?

(GAP IN TEXT)

Freedom National Bank?

A Yes.

Q And are those documents kept and maintained in the ordinary course of business of the bank?

A Yep.

Q And it is part of the business of the bank to keep records such as these of the accounts of its customers; is that right?

A Yes, it is.

MR. GENECIN: Your Honor, at this time the People offer exhibits 143 through 148 into evidence please.

THE COURT: All right.

Now members of the jury, let me just say this. With respect to these documents that have juste now be offered, we will have to go through these with all of the attorneys this afternoon and tomorrow. Because tomorrow, you know, we will no be in session. I mentioned that to you earlier. So we will do that. And obviously, we can't do that with you sitting in the jury box. We will, it will take a long period of time..

I am gong to excuse you now. And your services will continue on Monday at ten a.m. By

(GAP IN TEXT)

is self explanatory.

MR. GENECIN: That is correct.

THE COURT: 0959 payable to cash.

MR. MADDOX: Are yours legible, Judge?

THE COURT: Yes. Let me just show you these here.

MR. MADDOX: I think 095 does need redaction.

THE COURT: 959 says to Bill Pickett.

MR. MADDOX: Bill Picket needs to be taken out.

MR. GENECIN: Let me ask you something off the record.

(Whereupon, there was a discussion held off the record.)

MR. MADDOX: Same thing Judge, 0958.

THE COURT: Kims Fruit Plus. And I take it your objection is that these checks should not go in, Kim's Fruit Plus.

THE COURT: 960, same thing with a check for cash.

MR. MADDOX: I mean obviously, I think we can just make a general objection herein that, you know obviously, our position is that any of these checks made payable to cash are checks obviously that he has a right to write. That it was his money.

And unless there is some specific proof that it was actually money that should have been to the National Youth Movement I believe that it would be prejudicial just to allow the jury to see this and to assume that he was actually ripping off money that really was his.

So Unless the Attorney General's office can show that this is actually

Youth Movement money, that he had no right to write it as cash, that this document should not be admitted.

(T. 5694, 5732, 5954-55)

* * *

THE COURT: So the record is clear the checks that I allowed in, the checks written by Reverend Sharpton to cash as against the Hitbound account and as to the Sharp Report those checks were written to cash and some of the other checks for example the Hitbound account checks written to the telephone company, I take the position Hitbound account and the Sharp accounts are relevant to this proceeding because of all of the connections that were made with respect to the National Youth Movement.

(T. 9677)

EXCERPT FROM COURT'S CHARGE

Now jurors let me repeat for you what I said earlier. The specific fraud alleged by the People in count one include alleged solicitations made by the defendant with respect to the 1985 and 1986 Unity Awards Dinner, the war on crack celebrity dinner and the Think antidrug journal.

In addition, the People contend that this count refers to all alleged solicitations by which the defendant allegedly received money for the national Youth Movement in the periods mention in the indictment.

In addition, the fund raising activities, that is the 1985 and 1986 Unity Awards Dinner, the war on crack celebrity dinner and the Think Journal are the subject of counts two, three, four and five. (T 8348-8349)

COURT OF APPEALS
STATE OF NEW YORK

In the Matter of ALFRED C. SHARPTON, Petitioner-Appellant, -against- JOHN G. TURNER, JR., as ALBANY COUNTY COURT JUDGE, ET AL., Respondents.	AFFIRMATION IN OPPOSITION TO PETIONER-APPELLANT'S MOTION FOR PERMISSION TO APPEAL TO THE COURT OF APPEALS

CHRISTINE DUISIN, an attorney admitted to practice in the courts of this State and an Assistant Attorney General in the office of ROBERT ABRAMS, Attorney General of the State of New York, hereby affirms that the following statements are true under the penalties of perjury, except such as are made upon information and belief, which matter I believe to be true.

1. This affirmation is submitted in opposition to petitioner-

appellant's motion for leave to appeal to the Court of Appeals from an order of the Appellate Division, Third Department, entered August 1, 1991, dismissing petitioner's Article 78 proceeding seeking to prohibit his prosecution in the Albany County Court.

2. Petitioner's motion should be denied. His motion is neither timely nor meritorious.

3. Petitioner has not and cannot demonstrate that his motion for leave to appeal to this Court is timely as required by 22 N.Y.C.R.R. § 500.11(d)(iii). As petitioner admits, the order from which he appeals was entered August 1, 1991. See Defendant's Notice of Motion. " A motion for permission to appeal must be made within thirty days." C.P.L. R. § 5513(b). Petitioner's motion is dated November

20, 1991. Petitioner has made his motion approximately two months too late.

4. Petitioner has not shown "why the questions presented merit review by this Court" (22 N.Y.C.R.R. § 500.11[d][v] in the face of this Court's prior determination, on petitioner's purported appeal as of right from the Appellate Division order, that "no substantial constitutional question is directly involved" in petitioner's purported appeal as of right from the Appellate Division order, that "no substantial constitutional question is directly involved" in petitioner's Article 78 petition. See Petitioner's Exhibit A. The two substantive questions petitioner presents both raise constitution issues under the Double

Jeopardy Clause of the United States and New York Constitutions.

5. Petitioner attempts to meet the requirement of 22 N.Y.C.R.R. § 500.11[d][v] by arguing that the Third Department's decision in this case is in conflict with the First Department's decision in People v. Helmsley 566 N.Y.S. 2d 223 (1st Dept. 1991). However, there is no actual conflict between the Appellate Divisions. Petitioner claims only that the Third Department applied the statutory exception under C.P.l> § 40.20 (2)(b) incorrectly to the facts of this case and that the First Department applied the exception correctly. Petitioner is merely claiming that the third Department erred, not that the Third Department has applied legal principles

that conflict with those applied by the First Department.

6. In any event, the Appellate Division correctly dismissed the petition herein. As explained more fully in the People's Brief in the Appellate Division, submitted herewith, the prosecution of petitioner on the Albany County indictment is not barred by the Double Jeopardy Clause of the United States Constitution or by C.P.L. § 40.20.

7. Under Grady v. Corbin, _____ U.S._____, 110 S. Ct. 2084 (1990), petitioner must establish that with respect to teach count he challenges, an element of the crime charged will be proved in his second trial by conduct that constitutes an offense for which he was previously tried. To do this, he must show not merely that previously

prosecuted conduct is evidence of an element of the second offense, but that the previously prosecuted conduct constitutes the entirety of that element. United States v. Claderone, 917 F. 2d 717, 724 (2d Cir. 1990). See, Dowling v. United States, 493 U.S. _____, 110 S. Ct. 668 (1990).

8. Defendant has not and cannot make the required showing. If, for instance the sole income of defendant that the People could prove to establish his obligation to file a return was that which he was alleged to have obtained in New York County or that which he was alleged to have concealed by the falsification of business records charged there further prosecution might be barred. Defendant's taxable income, however, will be established without proving any of the crimes for which he

has already been tried. In the Albany County trial, defendant's obligation to file a 1986 return and the falsity of his 1987 return will be predicated upon proof of income earned through his business activities as a concert and record promoter, and not by means of any of the crimes charged in the New York County indictment.

9. The Appellate Division properly ruled that CPL § 40.20(2)(b) permits prosecution of petitioner on the Albany County indictment. All the crimes charged in Albany contain elements not found in the crimes charged in new York County. The law prohibiting scheme to defraud and larceny were enacted to prevent very different kinds of harm or evil that the harm or evil the criminal provisions of the Tax law and PL § 175.35 were enacted to prevent.

10. Petitioner's suggestion that CPL § 40.20(2)(b) is unconstitutional under Grady v. Corbin supra is irrelevant as Grady v. Corbin does not prohibit petitioner's prosecution on the Albany county indictment.

WHEREFORE, petitioner's motion should be denied.

Dated: New York, New York
November 30, 1991

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(2)

No. 92-570

Supreme Court, U.S.
FILED
OCT 27 1992
OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ALFRED C. SHARPTON,

Petitioner,

vs.

HON. JOHN G. TURNER, JR., Albany County Judge; ROBERT ABRAMS, Attorney General of the State of New York,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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No. 92-570

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ALFRED C. SHARPTON,

Petitioner,

— vs. —

HON. JOHN G. TURNER, JR., Albany County Judge; ROBERT ABRAMS, Attorney General of the State of New York,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

Respondents the Hon. John G. Turner, Albany County Judge and Robert Abrams, Attorney General of the State of New York respectfully submit this brief in opposition to the petition for certiorari. The petition should be denied because it does not present a conflict among the courts of appeals, or raise questions which have not previously been settled by this Court.

Statement of the Case

Petitioner is a defendant in a state indictment pending in the New York Supreme Court, Albany County. The indictment charges him with two felony counts for intentionally filing a false state income tax return for the tax year 1987, and one

misdemeanor count for failing to file a return for the tax year 1986.[1] Following his acquittal on a 67 count state indictment returned by a New York County Grand Jury, petitioner sought dismissal of the Albany indictment on double jeopardy grounds. He was, however, unsuccessful in the state courts (87a, 69a, 71a).[2]

Thereafter, petitioner sought a writ of habeas corpus from the United States District Court for the Northern District of New York (43a, 44a).[3] The district court (Hon. Howard G. Munson, Sr. Judge), denied the petition, holding that "the pending prosecution of [the] Albany County Indictment. . . .does not violate the Double Jeopardy Clause of the United States Constitution under the standards set forth in *Blockburger v. United States*, 284 U.S. 299 (1932), and *Grady v. Corbin*, 495 U.S. 508, 110 S. Ct. 2084 (1990)." (39a, 41a).

The court of appeals affirmed, agreeing that petitioner's "double jeopardy defense is unsupportable under the *Blockburger* test" and that, in light of this Court's "most recent instructions" in *United States v. Felix*, ____U.S.____, 112 S. Ct. 1377 (1992), petitioner's *Grady* argument was unavailing as well. (4a).

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[1] References to the Petition and the Appendix to the Petition are cited as "____", and "____a" respectively, while numbers in parentheses preceded by the letters "JA" refer to pages in the Joint Appendix in the court below.

[2] Petitioner's attempt to appeal directly to the New York Court of Appeals from the denial of his petition for a writ of prohibition was dismissed "upon the ground that no substantial question is directly involved." *Matter of Sharpton v. Turner*, 78 N.Y.2d 1071 (1991). Discretionary leave to appeal was also denied by the same Court. (69a).

[3] Petitioner is presently at liberty, having been admitted to bail by Judge Turner, and therefore, he is "in custody" for purposes of 22 U.S.C. § 2254(a). *Justices of Boston Municipal Court v. Lydon*, 466 U.S. 294 (1984). Since his argument is based on the double jeopardy clause, he has sufficiently exhausted his state remedies. *Abney v. United States*, 431 U.S. 651 (1977).

Petitioner's motion for reconsideration was denied by the court of appeals on June 29, 1992, as was an application to stay the issuance of the mandate and the trial in Albany County pending this petition. (1a). Petitioner applied to the Hon. Justice Clarence Thomas for a stay of his trial pending the dismissal of the instant petition for a writ of certiorari, or until "such time as this Court decides his appeal." That application was denied on October 5, 1992.

Reasons for Denying the Writ

In affirming the denial of the petition for a writ of habeas corpus, the court of appeals merely applied well-established principles of this Court. *See Grady v. Corbin*, 495 U.S. 508 (1990) and *Ashe v. Swenson*, 397 U.S 436 (1970).

Petitioner's argument is largely based on a misinterpretation of *Grady v. Corbin*, 495 U.S. 508 (1990). He supports his position by arguing that in the Albany County trial, the prosecution will prove some of the same conduct, using the same evidence, for which he was previously prosecuted in New York County. This is precisely the argument rejected only last Term by this Court when it reversed a Tenth Circuit opinion based on the same "extravagant reading of *Grady*". *United States v. Felix*, ____U.S.____, 112 S. Ct. 1377, 1382 (1992). In *Felix*, this Court reiterated that "*Grady* . . .disclaimed any intention of adopting a ' "same evidence" ' test" and that, accordingly, "a mere overlap in proof between two prosecutions does not establish a double jeopardy violation." *Id.*

The *Grady* test, under which a successive prosecution is prohibited if the prosecutor, "to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted," 425 U.S. at 521, is not implicated in this case at all. While some of the same evidence presented in New York County will be offered in the Albany trial, the prosecution will not prove conduct which constitutes an offense for which petitioner has already been prosecuted in order to establish the crimes charged.

For example, throughout the prosecution of petitioner, the respondent Attorney General has consistently stated an intention to "establish defendant's obligation to file a 1986 return and the falsity of his 1987 return based upon income he earned from his business activities and *not by means of any of the crimes charged in the New York County Indictment*". (JA-58) (emphasis added). While petitioner is completely in error in his contention that he was charged in the New York County case with having illegally obtained money "from concert and record promotion activities" (17) it would make no difference under *Grady* were he correct. Although tax crimes cannot be committed without predicate income-producing activity, they are separate in law from criminal offenses that happen to produce income. Acts that generate income, whether laudable or criminal, do not necessarily give rise to tax-related offenses. Nor are many acts of concealment of income, such as those allegedly engaged in by this appellant, illegal in themselves.[4]

Tax crimes require separate, distinct courses of conduct, such as the making of false statements in returns or willful failure to file. They must be shown, moreover, to be motivated by an intent to evade that is distinct from the criminal purpose of income-producing crimes such as larceny or scheme to defraud. Consequently, a prosecution for unlawful acts by which a defendant has obtained money does not create a double jeopardy bar to subsequent prosecution for failing to report that income on a tax return. *United States v. Jacobson*, 547 F.2d 21, 24 (2d Cir. 1976), *cert. denied*, 430 U.S. 946 (1977).

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[4] The bill of particulars in New York County alleged that the Scheme to Defraud charged in Count One of the indictment included appellant's use of "the bank accounts of National Youth Movement, Inc. to conceal from State tax authorities personal income he earned from his business activities in the field of entertainment and music promotion." (99a). As the court below found, "[e]ven if such conduct is a state offense, it was not the conduct for which Sharpton was prosecuted but, at most only a predicate for the scheme to defraud with which he was charged." (28a) Moreover, as the Appellate Division found, that conduct does not constitute any of the crimes charged in the Albany County indictment, *Sharpton v. Turner*, 170 A.D.2d 43, 46 (3d Dept. 1991).

In an attempt to show that the court of appeals' decision is contrary to precedent of this Court, petitioner relies on *Ashe v. Swenson*, 397 U.S. 439 (1970). *Ashe* involved the doctrine of collateral estoppel, which operates through the double jeopardy clause to preclude relitigation of an issue already resolved in a defendant's favor in prior proceedings. One who seeks to raise collateral estoppel, however, must demonstrate not merely that evidence will be presented a second time, but that a fact or facts necessarily determined in the first trial, constitute elements of the offenses to be tried in the second. *Dowling v. United States*, 493 U.S. 342 (1990); *Prince v. Lockhart*, 971 F.2d 118 (8th Cir. 1992); *United States v. Citron*, 853 F.2d 1055, 1058 (2d Cir. 1988). The defendant in *United States v. Jacobson*, 547 F.2d 21 (2d Cir. 1979), *cert. denied*, 430 U.S. 946 (1977) for example, argued that his acquittal of extortion estopped the government from proving in a subsequent trial his evasion of income tax on the interest from the allegedly extortionate loans. The Second Circuit, however, noted that the jury in Jacobson's first trial could have acquitted him because of a failure of proof regarding extortion, and not because of any failure to prove the existence of the loans and defendant's receipt of interest payments. Accordingly, the earlier verdict did not bar the government from proving the loans at the second trial.

Unlike in *Ashe*, the criminal conduct for which petitioner is to be tried in Albany County is not the same as that for which he has already been tried. Nor are there issues raised by the Albany County prosecution that were determined by the verdict in his trial in New York County. The New York County indictment charged that petitioner intended to defraud the State and City of New York as two of the more than ten required victims of Count One, charging Scheme to Defraud in the First Degree. *See* N.Y. P.L. § 190.65(1). Evidence that petitioner deposited monies he received as a record and concert promoter into the National Youth Movement account was presented in support of the charge in Count One that he schemed to defraud the State and City of New York, by showing that he hid business income. Petitioner's business activities generally were introduced to show that appellant had a personal financial interest in

operations of the National Youth Movement. The New York County indictment did not allege, nor did the prosecution attempt to prove, any illegality with respect to petitioner's music business activities. The verdict of the New York County jury is inconclusive with respect to whether appellant intended to evade taxes by means of the scheme to defraud charged in Count One. The jury could have found, for example, that appellant intended to defraud the State and City, but that he did not intend to defraud enough of the other alleged victims to prove the crime of scheme to defraud.

Contrary to petitioner's contention, there is no "conflict" among the circuits as to the "reach" of *United States v. Felix*, ____U.S.____, 112 S. Ct. 1377 (1992). The decision below, while recognizing that the precise holdings of *Felix* have "little bearing on [petitioner's] claim" (19a), and "of little pertinence to our case" (21a), simply found that *Felix* "offer[ed] some illumination of [the Supreme Court's] thinking as to the proper application of *Grady*," (19a) and that its "discussion [of these issues] is significant." (21a).

Without discussing the *Grady* issues clarified by *Felix*, petitioner contends that the court of appeals "extended" *Felix* in supposed contradiction to other circuits which have ostensibly "limited its application to cases involving conspiracies and continuing criminal enterprises". (55) The cases petitioner relies upon, *United States v. McHan*, 966 F.2d 134 (4th Cir. 1992) and *United States v. Smith*, 963 F.2d 892 (6th Cir. 1992) indeed discuss *Felix* only in terms of the applicability of *Grady* to cases involving "multilayered conduct" simply because that is the only issue raised in those cases. *See McHan*, 966 F.2d at 140; *Smith*, 963 F.2d at 894. *See also United States v. Elroy*, 968 F.2d 1143, 1145-6 (11th Cir. 1992).

In *Felix* itself, the Court specifically "caution[ed] against 'ready transposition of the "lesser included offense" principles of double jeopardy . . . to the multilayered conduct, both as to time and to place, involved in [continuing criminal enterprise (CCE)] prosecutions.' " 112 S. Ct. at 1385, quoting from *Garrett*

v. *United States*, 471 U.S. 773, 789 (1985). Recognition of this point by the courts of appeals does not undermine this Court's description of *Grady* as simply extending the prohibition against the prosecution of a lesser included offense established by *Blockburger* to a "species of lesser included offense". *Felix*, 112 S. Ct. at 1384.

There is no conflict among the circuits about the application of *Felix* to cases involving substantive offenses such as the present one. The only reported case from a federal court of appeals discussing *Felix* in the context of a double jeopardy argument against a prosecution for a substantive offense based upon a previous prosecution for a substantive offense is *Prince* v. *Lockhart*, 971 F.2d 118 (8th Cir. 1992). In *Prince*, habeas corpus was sought by a prisoner convicted of burglary and the underlying theft of property (pharmaceutical drugs) at a trial which followed his acquittal for possession with intent to deliver and simple possession of drugs identified as those taken during the same burglary. *Id.* at 120.

Prince is, therefore, directly on point. In that case, the Court of Appeals also cited *Felix* in reiteration of this Court's rejection in *Grady* of a "same evidence" test. *Id.* at 123. The Eighth Circuit rejected the double jeopardy argument and a collateral estoppel argument, finding that there was evidence to prove the elements of the burglary charge beyond that constituting the crimes for which *Prince* was acquitted. *Id.* Similarly, the *Prince* court found collateral estoppel did not apply since the second prosecution did not require proof of the commission of the possession crimes in order to establish the burglary or theft charges. *Id.* Accordingly, there is no conflict with the decision in this case which requires resolution by this Court.

CONCLUSION

FOR THE FOREGOING REASONS, THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED

Dated: New York, New York
October 28, 1992

Respectfully submitted,

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